DARIO DZANANOVIC

416 Sierra Lane, Bolingbrook, IL 60440 • +31-63-389-00-41 • dario.dzananovic@gmail.com

EDUCATION

RADBOUD UNIVERSITY NIJMEGEN, Nijmegen, Netherlands
Ph.D. in Migration Law, August 2020
- Fully funded four-year PhD research project
- Dissertation: comparative analysis of the role of faith-based organizations in shaping immigration law in the United States and Netherlands
- Followed courses on grant-writing and qualitative research
- Taught international students and professionals in the Radboud University Nijmegen Summer School (Faculty of Law) in 2018 and 2019

DEPAUL UNIVERSITY COLLEGE OF LAW, Chicago, IL, USA
J.D. *summa cum laude*, May 2014
GPA: 3.753/4.0, Class Rank: Top 5%
- Order of the Coif
- Dean's Scholarship all three years
- Dean's List: Spring 2012, Fall 2012, Spring 2013, Fall 2013, Spring 2014
- CALI Award for Excellence in Legal Writing, Spring 2012

RADBOUD UNIVERSITY NIJMEGEN, Nijmegen, Netherlands
LL.M. *cum laude*, May 2014 – European Human Rights and Migration Law
GPA: 8.46/10
- Thesis: comparative analysis of EU receptiveness of asylum seekers pre- and post-promulgation of the Common European Asylum System
- Excelled in courses on Advanced EU Law, EU External Relations Law, EU Competition Law, EU Immigration Law, and Sociology of Law

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, COLLEGE OF LIBERAL ARTS & SCIENCES, Champaign, IL, USA
B.A. *magna cum laude* in German, B.A. *magna cum laude* in International Studies with Business concentration, May 2011
GPA: 3.93/4.0
- Dean's List All Semesters
- Peter A. Schaeffer Scholarship ($3,000 scholarship for highest-achieving student in German undergraduate coursework)
- Co-founded Cultural Awareness of Former Yugoslavian Countries student organization
- Theta Chi Fraternity – Elected and served as Recruitment chair for two semesters, recruited 19 members

WORK EXPERIENCE

RADBOUD UNIVERSITY NIJMEGEN, Nijmegen, Netherlands
Postdoctoral Researcher, August 2020 – Present
- Fully funded research project: *Dutch American Friendship Treaty: History and Practice*

RAPIER LAW FIRM, Naperville, IL, USA
Of Counsel, January 2016 – January 2020
- Worked remotely on numerous pleadings and briefs in class action cases including those against construction companies, pesticide manufacturers, and CBD manufacturers

MYRON M. CHERRY & ASSOCIATES, LLC, Chicago, IL, USA
Litigation Attorney, August 2015 – December 2015
- Worked on a variety of class action cases, including those involving constitutional rights and consumer protection
- Handled all aspects of cases, including pleadings, discovery, settlement conferences, and court appearances before state and federal judges

GUILD CAPITAL, LLC, Chicago, IL, USA
Associate Counsel, September 2014 – July 2015
- Transactional work – *e.g.*, drafting operating agreements, subscription agreements, right of first refusal and co-sale, etc.
- Litigation – *e.g.*, breach of contract, tortious interference with prospective economic advantage, and other business torts

THE HONORABLE WILLIAM J. BAUER, UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, Chicago, IL, USA
Judicial Extern, January 2014 – April 2014
- Researched and prepared bench memoranda for the judge on various appeals in criminal and civil cases
- Met with Judge Bauer to discuss cases, and sat in on oral arguments

THE COLLINS LAW FIRM, Naperville, IL, USA
Law Clerk, June 2013 – August 2013
- Researched and prepared memoranda of law in the areas of commercial litigation, personal injury, and environmental contamination
- Drafted complaints, answers, briefs, motions, and other court documents in preparation for litigation
- Drafted appellant's brief for wrongful death claim that was reversed on appeal

THE HONORABLE JAMES MCGING, CIRCUIT COURT OF COOK COUNTY, Chicago, IL, USA
Judicial Extern, January 2013 – April 2013
- Researched and drafted opinions and memoranda of law in the areas of public nuisance, demolitions and gang activity
- Drafted orders under the supervision of Judge McGing

PROFESSOR SUSAN THROWER, DEPAUL UNIVERSITY COLLEGE OF LAW, Chicago, IL, USA
Legal Writing Teaching Assistant for beginning and intermediate legal writing and communication courses, August 2012 – May 2013
- Assisted students in preparing legal memoranda and briefs, and graded assignments
- Researched a variety of legal topics and issues to create assignments for the students

KAMM & SHAPIRO, PC, Chicago, IL, USA
Law Clerk, June 2012 – December 2012
- Researched and analyzed commercial litigation issues including foreclosure and bankruptcy in preparation for filing lawsuits and motions

PUBLICATIONS

- Dzananovic, D. (2020). The Catholic's Obligations Toward Migrants, *Mondi Migranti*, no 1/2020, 31-47.
- Dzananovic, D. (2019). *Church Assistance to Unauthorized Stayers. The U.S. and Netherlands Compared.* (Nijmegen Migration Law Working Papers Series, no 2019/3). Nijmegen: Radboud University Nijmegen.
- Grütters, C.A.F.M. & Dzananovic, D. (Eds.). (2018). *Migration and Religious Freedom. Essays on the interaction between religious duty and migration law.* Nijmegen: Wolf Legal Publishers.
- Dzananovic, D. (2017). *European Courts and Citizens Struggle to do "What's Right" Amidst Reactionary Migration Law and Policy.* Center for Migration Studies.

CONFERENCES

- **Queen Mary University of London** (October 2018): *CINETS* Conference
  - Presented paper titled "Church Assistance to Unauthorized Stayers. The U.S. and Netherlands Compared"
- **Harvard Divinity School** (October 2017): *Ways of Knowing* Conference
  - Presented paper titled "Money, Power and Fame: Key Indicators of Individual Interpretive Liberty of Religious Doctrine"
- **Radboud University Nijmegen Faculty of Law** (June 2017): PhD Symposium
  - Organized the first PhD Symposium held in English at the Faculty of Law
- **Radboud University Nijmegen Faculty of Law** (February 2017): Seminar on Migration and Religion
  - Organized a seminar in Nijmegen dealing with migration and religion which was attended by 30 experts from North America, Europe and Asia
  - Published a book from the seminar in 2018 (see above)
- **University of Fribourg** (November 2016): PhD Seminar at Center for Migration Law (Zentrum für Migrationsrecht)
  Presented paper titled "The Conflict Between Religious Duties and Migration Laws"
- **Roma Tre University** (September 2016): *I was a Stranger and You Welcomed Me* Conference
  - Presented working paper on the topic of religious duty to migrants

LANGUAGE SKILLS

- Fluent in Bosnian, English, and German
- Proficient in Dutch
- Conversational in Italian

HOBBIES & INTERESTS

- Hiking the Colorado "14ers"
- Cooking
- Geography and history trivia

Dario Dzananovic
DePaul University College of Law
Cumulative GPA: 3.753

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Writing Analysis and Research I	Susan Thrower	A-	2.0	
Civil Procedure	Steven Greenberger	B	4.0	
Torts	Bruce Ottley	C	4.0	
Contracts	Steven Resnicoff	A	4.0	

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Writing Analysis and Research II	Susan Thrower	A	3.0	Highest grade in class
Constitutional Process	David Franklin	A	4.0	
Criminal Law	Robert Smith	B	3.0	
Property	Roberta Kwall	A	4.0	

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Writing Analysis and Research III	Sandy Morris	A-	3.0	
Teaching Assistant for Legal Writing	Susan Thrower	PA	2.0	
Evidence	Leonard Cavise	A	3.0	
Business Organizations	Andrew Gold	A	3.0	
Wills and Trusts	Patty Gerstenblith	A	3.0	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Drafting-Real Estate	Ellen Gutiontov	B+	3.0	
Teaching Assistant-Legal Writing	Susan Thrower	PA	2.0	
Jurisprudence	Andrew Gold	A	3.0	
Field Placement		PA	2.0	
Secured Transactions	Margit Livingston	A	3.0	
Legal Profession	Mark Moller	A	3.0	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Sociology of Law	Anita Bocker	A	3	

EU Competition Law	Johan van de Gronden	A-	3
EU External Relations Law	H.C.F.J.A. de Waele	A	3
Advanced Notions of EU Law	Anne Looistijn	A	3
EU Immigration Law	Eslpeth Guild	A	3

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Independent Study	Steven Greenberger	A	3	Wrote thesis for my LL.M as part of independent study
Bankruptcy	Steven Resnicoff	A	3	
Trial Advocacy 1	Mary Brosnahan	A	3	
Trademark and Unfair Competition	Michael Grynberg	A	3	
Federal Appellate Judicial Externship	Honorable William J. Bauer	PA	3	

Grading System Description
A 4.0
A- 3.7
B+ 3.3
B 3.0
B- 2.7
C+ 2.3
C 2.0
C- 1.7
D 1.0
F 0.0

PA Pass

18 April 2020

honorable judge Jennifer Hall
US District Court

Dear Judge Hall:

Re: Dario Dzananovic
I am the PHD supervisor of the aboved named who has been under my supervision for the past four years. He is finishing his PHD, a final full draft is expected shortly.
Dario's research compares the legal challenges which the engagement on grounds of conviction of church bodies and representatives in the field of protection of migrants in the USA and the Netherlands. It is a fascinating study which is not only timely but up to date. Over the four years Dario has been under my supervision he has proven himself to be an excellent researcher. He is capable of in depth and meticulous legal research into a field which is both politically salient and touched by controversies about the legitimacy of humanitarian action based on religious commitment.
In his research, Dario has read literally hundreds of court judgments both from the USA courts and the European Court of HUman Rights. He has honed his skills of interpretation of legal decisions and is most respectful of the meaning and use of each word in a judgment. His understandoing of judicial decision making has developed in particular through the comparison of the different jurisdictions and this work has enabled him to see quickly and incisively the mechanisms through which courts realise the resolution of legal questions.
Dario is also highly motivated and hard working. He has not only captured the constitutional issues relevant to his thesis as regards US law but also those of the Netherlands, a complex and intellectually demanding job. He is also very personable and easy to work with. He grasps issues very quickly and is very thorough in his research. He has had to apply a variety of legal principles to his research and differentiate between different legal regimes and their application to religiously motivated commitment. In my view, these skills are highly transposable to the work of a clerk.
Dario also has substantial experience presenting his research, sometimes to ratehr hostile audiences. He is unflappable and is fully able to answer complex and challenging questions about his research relying on legal principles and their interpretation by the courts.
If I can be of any further assistance please do not hesitate to contact me
Yours sincerely
Elspeth Guild, Emeritus Professor, Radboud University, Netherlands and Jean Monnet Professor ad personam Queen Mary University of London

Elspeth Guild - eg42143@gmail.com

August 21, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This letter is to formally recommend Mr. Dario Dzananovic for a position as a law clerk in your chambers. I would like to start by expressing my high regard for Mr. Dzananovic.

I first met Mr. Dzananovic at the beginning of 2014 when I agreed to supervise his thesis for the LLM degree in European Human Rights and Migration Law at Radboud University in Nijmegen, the Netherlands. Next to the fact that Mr. Dzananovic worked very hard, and graduated in record time on a highly topical issue, he earned the highest grade I have given in 2014.

During the short period in which he wrote this thesis, I became impressed by his ability to grasp new concepts, select and process relevant data and generate conclusions. This became even more impressive when I learned that he not only graduated *cum laude* in Nijmegen, and *summa cum laude* in Chicago, but also served as a judicial extern to the Honorable William J. Bauer, US Court of Appeals (7th Cir.) at the same time.

In the past four years, Mr. Dzananovic worked as a PhD student at Radboud University under my supervision, and I am more than confident that he will successfully defend his dissertation and earn his PhD later this year. In the Netherlands, obtaining a PhD at a Law Faculty takes at least four years. In that period, the candidate holds a full-time position as a researcher and is supposed to formulate a research question, a research plan, perform the research, resulting in a book on this research project (± 100.000 words). During this period, the candidate has regular meetings with his supervisors in order to discuss progress and receive feedback.

The subject Mr. Dzananovic had to tackle, Sanctuary and the Rule of Law, not only implied an assessment of different faith-based organizations in the Netherlands and the USA, but also a comparison of Dutch and American constitutional, federal and administrative legal systems. Combined with the situation that there is little research already done in this field, the research project can be labeled as of great difficulty. In order to get grip of the Dutch system, Mr. Dzananovic even learned to read and write the Dutch language, which is not an easy task even when you are fluent in German, as Mr. Dzananovic is.

Next to his writing and the interviews he conducted with relevant stakeholders, Mr. Dzananovic also organized two seminars at our university. The first was a seminar in 2017 on the “Interaction between Religious Duty and Migration Law”. For this seminar, Mr. Dzananovic succeeded to gather thirty experts from all over the world to exchange views on the subject. The results of this seminar were published in a book: Grütters, C. & Dzananovic, D. (eds.) 2018. *Migration and Religious Freedom. Essays on the interaction between religious duty and migration law.* Nijmegen: Wolf Legal Publishers. The second seminar was also organized at Radboud University in 2017. This was a seminar that brought together all PhD staff members of the Law Faculty to exchange ideas and research project developments. For the first time ever, it was held in the English language.

Overall, based on my experience as a senior researcher with 35 years of experience at Radboud University, I find the research and writing abilities of Mr. Dzananovic to be of very high quality. Also, I would qualify Mr. Dzananovic as a pleasant person to work with. Thus, I am more than happy to recommend him as an impressive and outstanding candidate for a clerkship in your chambers.

Please feel free to contact me if you should have questions or require additional information.

Yours sincerely,
dr Carolus Grütters

Centre for Migration Law
Faculty of Law
Radboud University
Nijmegen, The Netherlands

Carolus Grutters - c.grutters@jur.ru.nl - +31243615701

The writing sample below is the argument section of an appellate brief I wrote. The main issue in the case was whether the Illinois Tort Immunity Act would shield a professor who implied a student's grades aloud to the class during lecture.

ARGUMENT

The trial court erroneously held that the Tort Immunity Act immunized Johanson's disclosure to the class, but it correctly held that Johanson had violated the Illinois School Student Records Act when he disclosed Anders' grade to the class. In appeals from summary judgment, the court conducts a review *de novo*. Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1210 (Ill. 1992).

I. THE TRIAL COURT INCORRECTLY HELD THAT A TEACHER IS ENTITLED TO IMMUNITY WHEN HE DISCLOSES A STUDENT'S GRADES BECAUSE THE TEACHER DID NOT MAKE A POLICY CHOICE, AND HE ACTED OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

When interpreting section 2-201 of the Tort Immunity Act, the trial court failed to apply the second prong of the test, policy decision, to the facts of this case. In addition, when interpreting section 2-210, the trial court failed to apply the relevant definition of "willful and wanton." When reviewing the trial court's holding with respect to the Tort Immunity Act, this Court should find that neither section 2-201 nor section 2-210 protect Johanson because (1) he was not making a policy choice when he disclosed Anders' grade, (2) the trial court applied an

erroneous definition of "willful and wanton," and (3) the trial court's broad reading of the Tort Immunity Act nullifies the Student Records Act and the purposes it was intended to serve.

A. Because the professor did not weigh competing interests before reaching his decision to yell at the student, he did not make a policy choice.

Johanson did not make a policy choice when he yelled at Anders because he was not implementing a policy, and he had not weighed competing interests before arriving at his decision. Illinois state law provides that "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 Ill. Comp. Stat. 10/2-201 (2012).

For a public employee who serves in a position that allows him to determine policy or act with discretion to prevail under this section, he must show that his conduct was both an exercise of discretion and a determination of policy. Albers v. Breen, 806 N.E.2d 667, 675 (Ill. App. Ct. 2004). A policy choice requires the public employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests. Id.

In Akpulonu, the court clarified the requirements for a finding that a public employee made a policy decision. Akpulonu v. McGowan, No. 03 C 4546, 2004 WL 2034084 (N.D. Ill. Aug. 12, 2004). In Akpulonu, a Chicago resident brought an action for defamation against the city and its superintendent. Id. at *3. The incident giving rise to the defamation claim involved the superintendent coming on the property at which the resident was living and calling him a "squatter" while a crowd gathered around the property. Id. The court held that section 2-201 did not immunize the superintendent because calling the resident a name in front of a gathering crowd simply was not policy-making. Id. at *14.

In the present case, Johanson essentially called Anders a bad student by disclosing that she failed his course the previous semester. Akpulonu is analogous to Anders' case with respect to policy determination. Just as in Akpulonu, in which a superintendent called a Chicago resident a squatter, in this case, Johanson called Anders a bad student. The facts are similar in that both cases involve name-calling in front of an audience. This behavior creates a strong inference that neither the superintendent nor Johanson weighed competing interests; it is impossible to imagine a situation in which mere name-calling would serve the best interests of any party. Moreover, weighing competing interests inherently involves considering alternatives to deal with a particular situation. In both instances, the superintendent and Johanson could have advised the resident and Anders about their behavior and conduct in a private setting, thereby avoiding both violations of the law and humiliation. If the superintendent and Johanson had given any thought to competing interests, they would have immediately discovered an alternative course of action: speaking in private. Upon discovery of the alternative action, they would have acted in that manner because no reasonable person could have decided that name-calling in front of a group of people would achieve any equitable or desirable result for any party.

In Albers, the court provided more guidelines as to what a public employee can do to satisfy the policy prong under section 2-201. In that case, a school principal who had received complaints from a student's mother decided to speak with one of the alleged bullies about the complaint. Albers, 806 N.E.2d at 667. The court found that this was a policy choice because the principal had balanced competing interests, such as the confidentiality of his information source, the appropriate level of punishment, and the concerns of the children's parents. Id. at 675.

Albers is distinguishable from the Anders' case with respect to policy decision in two crucial aspects. First, unlike in Anders' case, in which Johanson yelled at Anders shortly after

she fell asleep in class, in Albers, the principal deliberated his course of action for about ten days. Id. at 667. This difference is important because it demonstrates that the principal, unlike Johanson, had sufficient time to actually balance competing interests without making a rash decision. Second, the principal's ultimate decision to speak with the alleged bully lies well within reasonable conduct to rectify that particular situation. Speaking with the alleged bully serves multiple purposes such as putting the alleged bully on notice that his behavior was unacceptable or finding out the cause of the alleged bulling. Both of these purposes could reasonably be expected to remedy the bullying situation. Calling Anders a bad student and humiliating her in front of the class simply cannot be expected to help her do well. The nature of the principal's course of conduct along with the circumstances surrounding that event give rise to a very strong inference that he had indeed weighed the interests before making a decision; the circumstances in this case give rise to the opposite inference.

Moreover, there is nothing in the record to support the idea that Johanson weighed any interests before arriving at his decision to yell at Anders and disclose her grade. His decision to yell at her in front of a hundred peers strongly suggests that he put no thought into weighing competing interests, thus was not making a policy determination.

> B. Because he intended to cause the student emotional distress rather than to help her, the professor acted willfully and wantonly when he yelled at the student during class and disclosed her grade.

The trial court erred in dismissing the willful and wanton claim because although the court provided several alternative definitions of willful and wanton, it failed to apply the relevant definition to the facts of this case. The Act defines willful and wanton conduct as a "course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others. . ." 745 Ill. Comp.

Stat. 10/1-210. Section 2-210 provides that "a public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or the provision of information either orally, in writing, by computer. . . ." 745 Ill. Comp. Stat. 10/2-210 (2012). Section 2-210 unambiguously does not immunize willful and wanton conduct. Jane Doe-3 v. McLean County Unit Dist. No. 5 Bd. of Dir., 2012 IL 112479, ¶ 43.

The trial court, without considering whether Johanson's conduct demonstrated an intent to cause harm, dismissed the willful and wanton claim because it concluded that his conduct did not rise to the level of conscious disregard for the safety of others. R. at 45. The trial court should have considered the first part of the definition, which considers whether the course of action shows an actual or deliberate intention to cause harm.

The crucial question here requires this Court to discern what Johanson's intent was when he yelled at Anders. If Johanson's intent actually was to help Anders, he could have easily done it in less humiliating means as previously mentioned. According to Illinois state law, a person "intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 Ill. Comp. Stat. 5/4-4 (2012). Absent an admission from the accused, intent may only be proven circumstantially. People v. Rhodes, 401 NE.2d 237 (Ill. App. Ct. 1980). Because of its very nature, the mental element of an offense is established by circumstantial evidence and not direct proof. People v. Marchese, 336 N.E.2d 795 (Ill. App. Ct. 1975).

Johanson's deposition includes a multitude of comments demonstrating the animosity Johanson bore toward Anders. In his first comment about Anders, he described her as a "pretty bad student. Horrible, actually." (R. at 26:29-30.) He then went on to say that he had a bad

impression of her (R. at 27:9-12.) and that she was "very annoying" and "definitely immature." (R. at 27:13-18.) In fact, it "drove [Johanson] nuts" when Anders would fall asleep during class. (R. at 28:7-10.) Taken together, these statements show that Johanson disliked Anders because of her behavior, and he felt angry disrespected by her in his class. Put simply, Johanson wanted to get back at Anders for her disrespectful behavior toward him and the rest of the class.

The existence of at least one alternative to Johanson's conduct, such as waiting until after class to speak with her, along with Johanson's statements deposition show that his intent was to get back at Anders and humiliate her in front of her peers, not to help her do better in his class. Because Johanson acted with intent to cause Anders emotional harm, he acted willfully and wantonly, and section 2-210 does not immunize such conduct.

C. A court must read the "scope of employment" clause of section 2-210 narrowly because a broad reading nullifies the regulations and purposes of the Student Records Act.

Illinois state law provides that "no school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated." 105 Ill. Stat. Comp. 10/6 (2012). The statute dictates in what manner and under which circumstances a person or institution may disclose student records, and to whom. The Act was promulgated in an effort to protect the privacy interests of students. S. 79-71, Reg. Sess., at 26 (Ill. 1975). The Tort Immunity Act protects a public employee who discloses information while acting in the scope of his employment. 745 Ill. Comp. Stat. 10/2-210. Section 2-210 unambiguously does not immunize willful and wanton conduct. Jane Doe-3, 2012 IL 112479 at ¶ 43.

If this Court interprets the "scope of employment" clause of section 2-210 broadly, the Student Records Act will not have an effect on protecting privacy of students or regulating the manner of disclosure. A teacher or professor or any public official will freely be able to provide

any information to anyone so long as it is properly cloaked under his scope of employment, which the trial court here read with such generality that it renders it useless. Indeed, this is precisely what the court in Bagent was afraid of. Bagent v. Blessing Care Corp., 862 NE.2d 985 (Ill. 2007).

In Bagent, the court considered two factors in determining whether a phlebotomist (a person trained in drawing blood) acted within the scope of her employment. Bagent, 862 NE.2d at 993. In that case, a phlebotomist who received a fax with respect to blood test results of the patient later revealed to the patient's sister that the patient was pregnant. Id. at 989. Before the hospital employed the phlebotomist, she was required to sign a confidentiality agreement that prohibited her from disclosing any information from the hospital's records. Id. at 988. The court held that when she disclosed this information at a public tavern, she was not acting in the scope of her employment. Id. at 995.

In reaching this conclusion, the court considered 1) whether this was the kind of work that she was employed to perform and 2) whether her disclosure was furthering the purpose or interests of the hospital. Id. at 993. Under the first factor, the court found that the phlebotomist was employed to draw blood and record the results. Id. The court also considered the fact that she had signed a confidentiality agreement promising not to disclose these records. Id. at 994. Under the second factor, the court could not find any purpose that the phlebotomist's disclosure could have furthered. Id. Both factors weighed against a finding that she was acting in the scope of her employment and thus held her liable for her conduct. Id. at 995.

Bagent is analogous to the present case with respect to scope of employment. Just as in Bagent, in which a phlebotomist revealed the results of a patient's blood exam to her sister, in this case, Johanson revealed a student's grades to her peers. The facts are similar in that both

involve disclosure of information to third parties. Just as the confidentiality agreement forbade the phlebotomist from disclosing hospital records, the Student Records Act forbids teachers from disclosing students' grades. 105 Ill. Comp. Stat. 10/6. With respect to the first factor, it is clear that Johanson was employed in part to evaluate students' performance and record this information, but he was not employed to disclose it: indeed, the Student Records Act proscribes such conduct. 105 Ill. Comp. Stat. 10/6. Under the second factor, Johanson did not further a purpose of his employer, the school, by releasing damaging and embarrassing information about a student's grades.

When the trial court examined Johanson's conduct with respect to Anders, it described it generally as disciplining a student and concluded that such conduct was within the scope of teaching. In so doing, the trial court erred. Rather than examining Johanson's conduct as disciplining a student, it should have looked more narrowly at his specific conduct of disclosing her grade to the class. The proper question, thus, should have been whether Johanson's disclosure of Anders' grade to the class was in the scope of his employment, not whether disciplining a student was in the scope of his employment.

Had the trial court properly phrased the inquiry, it would have had no trouble in answering this question simply by looking to the plain language of the Student Records Act. The Act expressly forbids the disclosure of grades except under certain circumstances, none of which Johanson contends were present at the time of the incident. By defining the scope of employment so broadly, the trial court interpreted the statute in a way that runs afoul of the sanctions and prohibitions contained in the Act with respect to disclosure of students' grades. Simply put, a far-reaching protective interpretation of Tort Immunity does not comport with keeping student records private.

II. THE TRIAL COURT CORRECTLY HELD THAT THE PROFESSOR VIOLATED THE STUDENT RECORDS ACT BECAUSE THE PLAIN LANGUAGE OF THE STATUTE PROHIBITS DISCLOSURE OF RECORDS, AND THE INFORMATION CONSTITUTED A RECORD BECAUSE IT INDIVIDUALLY IDENTIFIED THE STUDENT.

The Illinois School Student Records Act provides that "no school student records or information contained therein may be released, transferred, disclosed or otherwise disseminated. . . ." 105 Ill. Comp. Stat. 10/6 (2012). The Act further defines a school student record as "any writing or other recorded information concerning a student and by which a student may be individually identified, maintained by a school or at its discretion or by an employee of a school, regardless of how or where the information is stored. 105 Ill. Comp. Stat. 10/2(d). Because neither party disputes that Johanson is an employee or that Anders is a student, the inquiry thus turns on whether Johanson disclosed a school student record. The trial court correctly held that he did and therefore violated the Student Records Act.

The trial court necessarily concluded that Johanson's conduct was a disclosure. As the trial court correctly pointed out, the primary rule in statutory interpretation is to determine and effectuate legislature's intent. Garlick v. Oak Park and River Forest High Sch. Dist. No. 200, 905 N.E.2d 930, 935 (Ill. App. Ct. 2009). The best evidence of intent is found in the language of the statute, and words should be given their plain and ordinary meaning. U.S. Bank Nat'l Assoc. v. Clark, 837 N.E.2d 74, 82 (2005).

The plain language of the statute prohibits the release, transfer, and disclosure of student records and information contained therein. 105 Ill. Comp. Stat. 10/6. This list, however, is merely illustrative. The enumerated verbs are similar in that they all deal with certain information getting from point A to point B, though the channel may differ. When legislature enacts a statute that includes several similar items and a final ambiguous category, such as

"otherwise disseminate" here, the list cannot be read to cover everything that legislature had intended to cover. If that were the case, legislature would simply have omitted "otherwise disseminate" and replaced it with all of the words that it intended to encompass, or it would have just omitted the catch-all phrase altogether.

In the present case, Johanson was the channel through which the information got from point A, the school's record of her grades, to point B, the students present in Johanson's class at the time of the incident. Merely labeling Johanson's action as implication does not take it outside the scope of the statute because the students received the information about Anders' through Johanson. The statute was intended to cover this conduct; otherwise, a person could avoid violating the statute simply by calling his conduct something other than release, disclosure, or transfer, even though it renders the same effect.

Having established that Johanson did disclose Anders' grade, this Court should reaffirm the trial court's finding that it was individually identifiable recorded information. There is no dispute that her grade in Johanson's prior class was recorded. Johanson did not just disclose *a* grade, he disclosed *Anders*' grade; he addressed her in the first person when he told her that passing his course did not work for her last semester. (R. at 30:19-24.) Given that Johanson was speaking to Anders when he said this, every student in the class knew exactly whose grade he disclosed.

The foregoing interpretation of the Student Records Act is wholly consistent with the importance of privacy and the legislature's intent as evidenced by Illinois legislative history and the Family Educational Rights and Privacy Act. When deciding whether the Student Records Act should extend to private as well as public educational institutions, the Illinois senate pointed out that "[i]t is not the [the school's] privacy which is at stake . . . it is that of those who are

students in the school." S. 79-71, Reg. Sess., at 26 (Ill. 1975). This statement illustrates that the Student Records Act was intended to benefit students in schools, not the schools or institutions themselves. Allowing Johanson to shield himself against liability would benefit him, the professor, and not Anders, the student; this would run afoul of the expressive intent evidenced by the 79th General Assembly.

The Family Educational Rights and Privacy Act, a federal statute similar to Illinois' Student Records Act, reinforces the fundamental notion that privacy interests require protection in school settings. FERPA permits the distribution of federal funds only to schools that allow limited access to student records under special circumstances to certain people, such as the students' parents. 20 U.S.C. § 1232g(a)(1)(A) (2012). The purpose of FERPA was to remedy violations of students' privacy by unauthorized releases of information. Jensen v. Reeves, 45 F. Supp. 2d 1265, 1275 (D. Utah 1999).

Taken together, these statutes, documents and cases illustrate the central role of privacy in the realm of education. The Student Records Act is a manifestation of legislature's intent to protect privacy interests in education, and this Court must construe the application of the statute in a way that comports with legislature's clearly expressed intent.

From a policy standpoint, given that we live in a world in which higher education has become increasingly vital for obtaining employment, we must ensure that students are able to actually benefit from their educational institutions. If a court permitted the Student Records Act to give way to the immunities of the Tort Immunity Act, it would abolish students' privacy protections. Students, especially those sensitive to a disclosure of grades because of their poor performance, would become reluctant to attend school because of the likelihood of embarrassment and humiliation. Indeed, this is exactly what happened to Anders in the case at

hand: after the incident, she was unable to return to class because of the humiliation she received not only from Johanson but also from her fellow peers. (R. at 20:2-9.) As a society that values higher education, we must encourage, rather than discourage, students to attend school regularly, and protecting the privacy of students' grades will conceptualize school as a comfort zone where all students can learn without fear of humiliation.

CONCLUSION

April Anders has shown that the circuit court erred in finding that the Tort Immunity Act shielded Johanson from his conduct because he was not making a policy choice when he yelled at Anders in front of her peers, he was not acting within the scope of his employment, and his conduct was willful and wanton. Anders has also shown that the circuit court correctly held that Johanson violated the Student Records Act because the plain language of the statute covers implication, and legislature passed the Act to protect students' privacy with respect to their school records.

WHEREFORE, the Plaintiff-Appellant, APRIL ANDERS, respectfully prays that this Court enter an order reversing the trial court's decision with respect to the Tort Immunity Act, and upholding the trial court's decision with respect to the Student Records Act.

Applicant Details

First Name	**Andrew**
Middle Initial	**C**
Last Name	**Escano**
Citizenship Status	**U. S. Citizen**
Email Address	**aescano209@gmail.com**
Address	**Address** Street **2120 S. State College Blvd., Apt. 3046** City **Anaheim** State/Territory **California** Zip **92806** Country **United States**
Contact Phone Number	**209-915-0769**

Applicant Education

BA/BS From	**University of California-Merced**
Date of BA/BS	**May 2013**
JD/LLB From	**Loyola Law School** **http://www.lls.edu**
Date of JD/LLB	**May 19, 2019**
Class Rank	**25%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**California**

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

West-Faulcon, Kimberly
kimberly.west-faulcon@lls.edu
(213) 736-8172
Hawthorne, Christopher
christopher.hawthorne@lls.edu
(213) 736-8344
Apkarian, Isabel
isabel.apkarian@pubdef.ocgov.com

References

Professor Kimberly West-Faulcon
(818) 445-2067
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Professor Christopher Hawthorne
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Isabel Apkarian
(949) 500-9364
isabel.apkarian@pubdef.ocgov.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ANDREW C. ESCANO
10400 Paramount Blvd., #6 • Downey, CA 90241 • aescano209@gmail.com • (209) 915-0769

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr.
United States Courthouse
701 East Broad Street
Richmond, VA 23219

August 22, 2020

Dear Judge Hanes:

I am extremely interested in clerking in your chambers. I am a graduate of Loyola Law School Los Angeles and currently a Deputy Public Defender with the Offices of the Orange County Public Defender. My desire to clerk stems from my experience externing for the Honorable Raymond A. Jackson in the United States District Court for the Eastern District of Virginia. From that experience, I have a profound appreciation for the judicious resolution of litigation and wish to serve as a clerk to participate in that process more fully.

I believe I have the legal skills to be an excellent judicial clerk because of my educational and professional experience. In law school, I immersed myself in courses and activities that focused on research and writing. In my 2L year, I enrolled in appellate litigation in which I did extensive legal research and writing. Based on my success in that class, I qualified for and competed in the Scott Moot Court Competition. In my brief for the competition, I argued for the extension of protected classifications under Title VII of the Civil Rights Act and that a state civil rights law did not violate the Free Speech and Free Exercise Clauses of the First Amendment. Given the unsettled nature of these issues, my research required extensive analysis of case law, legislative history, and administrative advisory opinions. At the same time, I continued to hone my research and writing skills while working for my former Constitutional Law professor. As Professor West-Faulcon's research assistant, I worked on various assignments ranging from researching and writing objective memoranda on federal and state preemption, claims of racial discrimination in selective college admissions, the parameters of the Presidential pardon power under Article II of the Constitution to compiling detailed summaries and analysis of recent cases from the United States Supreme Court. These combined experiences trained me to analyze and write on nuanced legal issues.

Now, as a Deputy Public Defender, I continue to apply these skills in representing my clients throughout the trial process while managing a large number of misdemeanor cases. I believe the skills I currently employ to manage my caseload would translate to managing a heavy court docket as your clerk. Through my current legal work, I have gained substantive legal knowledge beyond the traditional law school curriculum and applied my research and writing skills in a demanding, time-sensitive, and project-driven context that requires accuracy and thoroughness.

With this strong foundation, I believe I have developed the skills that would make me an effective judicial law clerk in your chambers. Please find my resume, writing sample, and law school transcript enclosed. If you have additional questions or need any further materials, please contact me at (209) 915-0769 or aescano209@gmail.com. Thank you for your consideration.

Sincerely,

Andrew C. Escano

ANDREW C. ESCANO

10400 Paramount Blvd., #6 • Downey, CA 90241 • aescano209@gmail.com • (209) 915-0769

EDUCATION

Loyola Law School, Los Angeles, CA
J.D., May 2019
Class Rank: Top 25%

Honors: First Honors (highest grade in class): Trial Advocacy & Criminal Litigation
Activities: Scott Moot Court Competition
Research Assistant for Loyola Law Professor Kimberly West-Faulcon
Young Lawyers Program, *Mentor Coordinator*
Summer Institute Mentorship Program, *Mentor to First-Year Law Student*
Just the Beginnings Judicial Internship Project, *Participant*

University of California, Merced, Merced, CA
B.A. in Political Science*, with Honors,* & Minor in Sociology, May 2013
Class Rank: Top 10%

Honors: Dean's Honor List & Chancellor's Honor List
Activities: Research Assistant for Associate Professor Robin DeLugan
Political Science Student's Association, *Founding Member & Vice President*

EXPERIENCE

Orange County Public Defender, Fullerton & Santa Ana, CA — Summer 2019-Present
Deputy Public Defender (2020-Present), Felony-Panel Law Clerk (2019)

- Represent over 150 misdemeanor defendants in all stages of trial litigation, including arraignment, pre-trial hearings, jury trials, and post-conviction proceedings.
- Research legal issues, draft and file motions on various criminal and evidentiary issues, file and design discovery and investigative requests, analyze discovery, and develop defense strategies based on analysis of investigators' reports.

Juvenile Innocence and Fair Sentencing Clinic, Los Angeles, CA — Summer 2018-19
Certified Law Clerk

- Represented indigent clients in habeas corpus proceedings and youth-offender parole hearings.
- Researched and wrote reply briefs on legal issues such as ineffective assistance of counsel, prosecutorial misconduct, cruel and unusual punishment, innocence under California law, and various procedural issues.
- Argued motion in limine seeking admission of authenticity of a foreign birth certificate.
- Delivered opening and closing statements and direct examined an expert witness seeking admission of mitigation evidence of a client's youth.

American Civil Liberties Union, Southern California, Los Angeles, CA — Spring 2018
Law Clerk, Criminal Justice & Police Practices Units

- Researched and wrote memoranda providing a comparative analysis of the Fourth Amendment's excessive force standard to California's self-defense standard.
- Researched facts underlying prosecutorial charging decisions of law enforcement officers in Los Angeles County.

U.S. District Court for the Eastern District of Virginia, Norfolk, VA — Summer 2017
Judicial Extern to the Honorable Raymond A. Jackson

- Researched legal issues, wrote bench memoranda, and prepared first drafts of memoranda and opinion orders on issues ranging from standing under the Americans with Disabilities Act and motions to dismiss for failure to state a claim for relief under the Federal Debt Collections Practices Act to state employment discrimination law and motions to modify criminal sentences.

California Rural Legal Assistance, Inc., Stockton, CA — Spring-Summer, & Winter 2016
Law Clerk and Intern

- Researched and wrote memoranda regarding a waiver of educational resources under the Individuals with Disabilities Act.
- Co-drafted brief on expedited expulsion of high school student.
- Analyzed and summarized depositions and interrogatories for employment discrimination trial.

BAR ADMISSIONS

Admitted to the State of California (Dec. 2019)

ADDITIONAL INFORMATION

Bar associations: Orange County Bar Association, Philippine American Bar Association, and Los Angeles County Bar Association

Volunteer: Legal Education Access Pipeline (Attorney Mentor to Law School Applicant)

Andrew Escano
Loyola Law School
Cumulative GPA: 3.61

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Lauren E. Willis	B	3	
Contracts	Hiro Aragaki	B	2	
Criminal Law	Stanley A. Goldman	A-	4	
Legal Research and Writing	Mary F. Dant	B	2	
Property	Lee Petherbridge	A-	5	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Lauren E. Willis	B	2	
Contracts	Hiro Aragaki	B	3	
Introduction to Immigration Law	Kathleen Kim	B+	3	
Legal Research and Writing	Mary F. Dant	B	2	
Torts	Jennifer E. Rothman	B+	5	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Sean Kennedy	A	3	
Civil Rights Litigation Practicum	Gary C. Williams	A-	4	
Constitutional Law	Kimberly West-Faulcon	A-	4	
Ethical Lawyering	Paul T. Hayden	A+	3	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Associations	Elizabeth Pollman	B+	4	
Civil Rights Litigation Externship	N/A	P	4	Class was pass or fail
Evidence	Kevin Lapp	A-	4	
Scott Moot Court	N/A	P	2	Class was pass or fail

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure	Marcy Strauss	B+	4	
Fundamentals of Bar Exam Writing	Susan Smith Bakhshian	P	2	Class was pass or fail

Fundamentals of Juvenile Post-Conviction and Sentencing Litigation	Christopher Hawthorne	A+	3	
Juvenile Innocence & Fair Sentencing Clinic	Christopher Hawthorne	P	2	Class was pass or fail
Marital Property	Jan Costello	B-	2	
Trial Advocacy	Guy Iversen	A+*	3	First Honors = Highest grade in class

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fundamentals of Juvenile Post-Conviction and Sentencing Litigation	Christopher Hawthorne	A+	2	
Introduction to Negotiations	Kimberly Thigpen Tyler	A	2	
Juvenile Innocence & Fair Sentencing Clinic	Christopher Hawthorne	P	4	Class was pass or fail.
Pre-Trial Criminal Litigation	Guy Iversen	A+*	3	First Honors = Highest grade in class
Trusts and Wills	Joseph Sliskovich	A-	4	

Grading System Description
Letter Grade / GPA Value
A+* = 4.667
A+ = 4.333
A = 4
A- = 3.667
B+ = 3.333
B = 3
B- = 2.667
C+ = 2.333
C = 2
D = 1.333
F = 0.333

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Andrew Escano is an extremely impressive young man. Not only did he excel academically in an extremely competitive and challenging academic environment, he has the intellect and work ethic to apply the knowledge and skills he acquired in law school and in practice to be an immensely valuable law clerk. Andrew was one of my longest-serving, most reliable, and most productive research assistants in the over 15 years I have been a law professor. As the numerous academic and non-academic accomplishments on his resume reflect, Andrew is immensely intelligent and diligent. In addition, Andrew is professional, personable, and respectful. Based on my own experience as a clerk to the Honorable Stephen Reinhardt on the Ninth Circuit Court of Appeals, I sincerely believe Andrew will make a valuable law clerk in your chambers.

I hired Andrew as my research assistant after his excellent performance in my Fall 2017 Constitutional Law course. Over the period that I have had the pleasure to teach and supervise Andrew, he stood out among my research assistants. He completed a variety of complex research and writing assignments in an excellent manner. Andrew wrote impressive research memos and made regular verbal reports on his many research assignments that demonstrated an impressive mastery of constitutional and statutory legal issues. In the course of working for me, Andrew regularly showed me that he is a self-starter and critical thinker. He would be the kind of law clerk you could trust to do thorough research, writing, and legal analysis. In light of how impressive Andrew's legal research and analytical skills were in law school, he is even better prepared to serve as a law clerk now that he has the post-law school substantive and professional experience of working for the Offices of the Orange County Public Defender as both a law clerk and currently as a Deputy Public Defender.

I know from numerous personal conversations with Andrew that his interest in clerking stems from a sincere and deep commitment to the fair administration of justice as well as a sincere and deep intellectual interest in law. I have shared with Andrew how much I gained from clerking for Judge Reinhardt, including how much better a lawyer I was during my decade of practice because of my clerkship. Andrew wants to serve as a law clerk for all the right reasons.

In my view, Andrew possesses traits that are highly valuable in a law clerk—intelligence, maturity, and diligence. Thus, I sincerely believe Andrew would be a superb law clerk. If you need additional information about Andrew, I am very happy to provide it. I can be reached at (818) 445-2067 (cell).

Respectfully yours,

Kimberly West-Faulcon
James P. Bradley Chair in Constitutional Law
Professor of Law
Loyola Law School, Los Angeles

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I would like to give my wholehearted recommendation to Andrew Escano as a federal judicial clerk. Andrew would be a consummate clerk: he is tremendously hard-working, with an inquiring intelligence and excellent writing skills. He has demonstrated his ability to excel in a variety of legal settings.

Andrew joined my legal clinic, the Juvenile Innocence & Fair Sentencing (JIFS) Clinic, in summer 2018. The JIFS Clinic is a post-conviction criminal justice clinic, focusing on juvenile resentencing and habeas corpus relief. Students function as attorneys, drafting and filing habeas petitions, interviewing witnesses and clients, defending motions in court and conducting resentencing and parole hearings. The cases are high value and high risk. Excellent writing and research, as well as innovative thinking, are highly prized. I expect a high degree of intellectual depth, maturity and professionalism from my students. The application process is designed to weed out students who are merely ambitious from those who have the capacity to go the distance.

Andrew began full-time during the summer of 2018, and immediately took charge of a complex case: a 15 year-old wrongful conviction that had stalled at the filing stage. Andrew took over shaping and finalizing the petition, and in the process, became the client's most valuable contact. Later in 2018, the petition and exhibits became the basis for Governor Brown's grant of clemency, which led to the client's release. Andrew handled the Franklin mitigation hearing for another juvenile lifer client, doing an impressive direct and redirect of an expert, as well as the pleadings. He also worked with me on an exceedingly complex habeas corpus case in Los Angeles Superior Court, where he was particularly effective in dealing with our appointed investigator.

I focus on the practical considerations and realities of law practice, because law school is only a proxy for the real-world problems that arise during professional life. As detailed above, Andrew transitioned expertly into the professional world, demonstrating not only intellectual acumen but the ability to make connections and ask questions that get to the heart of a case. He also has the writing and analytical skills to get his insights on paper. Receiving Andrew's draft of a pleading was both a relief and a pleasure.

Finally, it is a pleasure to work with Andrew. His intellectual curiosity and his sense of humor are genuine assets. He never shies away from getting into the deeper significance of a case, or straightening out the knotted reasoning of a complex opinion. He masters material – even voluminous records – swiftly and efficiently, and shows up ready to engage with the case before many students have even begun to parse the issues.

For all of the reasons above, I urge you to give Andrew Escano your most serious consideration. Please call me at (213) 736-8344 if you have any questions.

Respectfully yours,

Christopher Hawthorne
Clinical Professor of Law
Director, Juvenile Innocence & Fair Sentencing Project
Loyola Law School Los Angeles

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

My name is Isabel Apkarian. I am an Assistant Deputy Public Defender with the Orange County Public Defender's Office. I have worked as an attorney in this office for over 17 years. Over this past year, I have had the opportunity to supervise Andrew Escano as both a post-bar law clerk and now as a Deputy Public Defender. He has excelled in every aspect of the job, ranging from researching and writing motions to managing a heavy misdemeanor caseload. At the same time, he has garnered a reputation for being professional and personable with those he works with in our office. Without hesitation, I believe Andrew would be a great addition as a law clerk in your chambers.

Andrew first started working for me last August as a post-bar law clerk while I was still handling a felony caseload. Andrew immediately showed a genuine interest in research and writing by immersing himself in any writing assignment I gave him. He thoroughly researched each issue, and every time he wrote a motion, he went through multiple revisions, showing that he has a keen eye for editing. Andrew is also very thoughtful about how he reviewed the cases I worked on, often combing through extensive discovery. Throughout his post-bar position, he exhibited a number of impressive abilities and character strengths. He is astute, thorough, intellectually interested in all aspects of the work, hardworking, and professional beyond his years. Andrew is down to earth and clearly appreciative of the opportunities he is earning. No task was too small for him, but he certainly welcomed being challenged. While you have considerable information demonstrating Andrew's intellectual capabilities, perhaps the greatest value of my significant observations—he worked 40 hours a week plus additional time as needed to ensure that he provided work product that was well thought.

Now, as his Head of Court, I have the opportunity to supervise him as a Deputy Public Defender further. As an attorney, Andrew continues to drive himself to excel at his work while handling a heavy misdemeanor caseload, especially during this unprecedented time of COVID-19. Regardless, Andrew has adapted well to these unfamiliar circumstances and yet still provide the same thoughtful and thorough work product.

Based on what I have seen, Andrew's intellect and professionalism allow him to excel in the legal field and do so in a manner that gains the respect of his fellow attorneys and judicial officers. In sum, I truly believe Andrew possesses the qualities that would make him an invaluable law clerk for your chambers. If you have any additional questions, please do not hesitate to contact me at (949) 500-9364.

Respectfully yours,

Isabel Apkarian,
Assistant Deputy Public Defender

WRITING SAMPLE

Andrew C. Escano
10400 Paramount Blvd., Apt. #6
Downey, CA 90241
(209) 915-0769

The attached writing sample is an objective memorandum I wrote as a research assistant for Professor Kimberly West-Faulcon analyzing cross-motions for summary judgment in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation*), 1:14CV14176 (D. Mass. filed June 15, 2018 & July 30, 2018). Please note that this memorandum is my work product and has not been edited by any other person. I have received permission from Professor West-Faulcon to use this memorandum as a writing sample.

In that case, Students for Fair Admissions, Inc. and the President and Fellows of Harvard College filed cross-motions for summary judgment on five issues. For brevity's sake, this submission includes only the primary contention on the issue of standing and a full analysis of Count III. The relevant background information on these two issues has also been omitted as a means of reducing its length.

TO: Professor Kimberly West-Faulcon
FROM: Andrew C. Escano
RE: Memorandum re: Cross-Motions for Summary Judgment:
Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 1:14CV14176 (D. Mass. filed June 15, 2018 & July 30, 2018)
DATE: 6/22/20

MEMORANDUM

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Garcia-Garcia v. Costco Wholesale Corp.*, 878 F.3d 411, 417 (1st Cir. 2017) (internal quotation marks omitted); *see* Fed. R. Civ. P. 56. "An issue is 'genuine' if the evidence of record permits a rational factfinder to resolve it in favor of either party." *Borges ex rel. S.M.B.W. v. Serrano-Isern*, 605 F.3d 1, 4-5 (1st Cir. 2010). "A fact is 'material' if its existence or nonexistence has the potential to change the outcome of the suit." *Id.* at 5. A court must review "the record in the light most favorable to the nonmovant and must make all reasonable inferences in that party's favor," while ignoring "conclusory allegations, improbable inferences, and unsupported speculation." *Garcia-Garcia*, 878 F.3d at 417 (internal quotation marks omitted). "The standards are the same where, as here, both parties have moved for summary judgment." *Bienkowski v. Northeastern Univ.*, 285 F.3d 138, 140 (1st Cir. 2002).

ANALYSIS

I. SUMMARY JUDGMENT AS TO SFFA'S STANDING

As a preliminary matter, this Court must resolve Harvard's renewed claim that SFFA lacks standing. Harvard Mem. Summ. J. 11-15. Harvard asks this Court to reconsider its initial holding that SFFA has associational standing, *see Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation)*, 261 F. Supp. 3d 99, 107, 111 (D. Mass. 2017), arguing that new

discovery shows otherwise. As discussed below, this Court should deny Harvard's motion for summary judgment on this issue and hold that SFFA maintains associational standing.

A. Legal Standard

Article III of the Constitution limits federal-court jurisdiction to actual cases or controversies. *See* U.S. Const. art. III, § 2, cl. 1. Inseparable from this case-or-controversy limitation is the requirement that a plaintiff demonstrate it has standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Rooted in the idea of separation powers, *Raines v. Byrd*, 521 U.S. 811, 820 (1997), standing "serves to prevent the judicial process from being used to usurp the powers of the political branches and confines the federal courts to a proper[] judicial role," *Spokeo, Inc. v. Robins*, 136 S. Ct 1540, 1547 (2016) (internal quotation marks and citations omitted).

Standing is comprised of both constitutional requirements and prudential considerations. *Pagán v. Calderon*, 448 F.3d 16, 27 (1st Cir. 2006). The "irreducible constitutional minimum" of standing consists of three elements. *Lujan*, 504 U.S. at 560. First, a plaintiff must have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotation marks omitted). Second, the defendant's conduct must have caused the plaintiff's injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). Lastly, the requested relief must likely redress the alleged injury. *Id.* Complementing these constitutional requirements are the prudential considerations, which require a plaintiff's claim to be premised on his own legal rights, is not merely a generalized grievance, and is an interest the law protects. *Pagán*, 448 F.3d at 27.

An association, like SFFA, may have standing to sue for its members even if itself has not suffered any injury. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to

the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. "So long as this can be established, … [SFFA] may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

The party invoking federal jurisdiction bears the burden of proving each element "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561; *see Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). Where a case is at the summary judgment stage, as here, a plaintiff must cite to particular facts in the record, when taken as true, to support that standing exists. *Lujan*, 504 U.S. at 561. Because the standing inquiry is claim-specific, a plaintiff must demonstrate standing for each claim sought. *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012).

B. Analysis

Harvard argues that SFFA lacks associational standing for three reasons. First, it argues that *Hunt*'s indicia-of-membership analysis applies, and SFFA fails to meet that test. Harvard Mem. Summ. J. 12. Second, Harvard asserts that the standing members lack a concrete stake in this lawsuit's outcome as required under Article III. *Id.* at 13. Finally, Harvard argues that SFFA cannot establish standing through the parents of rejected and prospective applicants to Harvard. *Id.* at 15.

1. *Hunt*'s Indicia-of-membership

The core of Harvard's first argument is that SFFA fails to meet *Hunt*'s indicia-of-membership analysis for associational standing, Harvard Mem. Summ. J. 12, calling into question SFFA's status as a traditional voluntary membership organization, *id.* at 12. First, Harvard points out that SFFA amended its bylaws to hold meetings for its members and to allow them to elect one SFFA director, which happened after it made clear that it would challenge SFFA's standing. *Id.* Depositions show, Harvard argues, that the members have not attended any meetings and they have

refused to provide whether they voted in any director elections. *Id.* Second, of SFFA's 20,000 members, recent tax filings show that only a tiny fraction of those members pay dues. *Id.* By contrast, those same filings show that unidentified donors gave SFFA about $2 million in 2015 and 2016. *Id.* at 13. Harvard claims that this evidence shows that SFFA's membership is disingenuous and serves as nothing more than a litigation vehicle for its founder, Edward Blum. *Id.* at 11-13.

In *Hunt*, the United States Supreme Court addressed the issue of whether the Washington State Apple Advertising Commission, a state created agency, had associational standing to sue on behalf of its constituents even though it was not considered a traditional voluntary membership organization. *Hunt*, 432 U.S. at 343-45. There, Washington State required that all apples shipped out of state to bear the Washington State grade on its closed containers to signify that its apples have met the state's stringent quality standards. *Id.* at 336. To ensure the promotion and protection of the market for its acclaimed apples, the State created the Commission, which was composed of 13 Washington apple growers and dealers who were nominated and elected by their fellow growers and dealers. *Id.* at 336-37. The Commission's activities were financed entirely by assessments levied upon the apple industry. *Id.* Annually, Washington State shipped many closed containers of apples bearing the Washington State grade to North Carolina. *Id.* at 337-38. However, in 1973, North Carolina enacted a regulation expressly prohibiting any state grades from being displayed on all closed containers of apples shipped into or sold in the state. *Id.* at 337-38.

After holding that the Commission met the three requirements for associational standing, *id.* at 343-45, the Court further held that the Commission's status as a state agency, rather than a voluntary membership organization, did not preclude it from suing on behalf of the growers and dealers who formed its constituency, *id.* at 344. The Court found important two things: that the Commission sought to protect and promote Washington's apple industry, and that the growers and dealers that formed the Commission's constituency possessed the "indicia of membership in an

organization" because they elected their members, served on the Commission, and financed its activities. *Id.* at 344-35. The Court concluded that the Commission "represent[ed] the State's growers and dealers and provide[d] the means by which they express[ed] their collective views and protect[ed] their collective interests." *Id.* at 345.

Contrary to Harvard's argument, this Court need not apply *Hunt*'s indicia-of-membership test. Courts have commented that the indicia-of-membership test is an alternative means, but is not required, for an organization to establish associational standing when it has no formal members but operates functionally equivalent to a traditional trade association. *See Hunt*, 432 U.S. at 344-45; *see, e.g.*, *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n*, 266 F. Supp. 3d 297, 307 (D.D.C. 2017) ("To the extent [a plaintiff] does not have a formal membership, it may nonetheless assert organizational standing if the organization is the functional equivalent of a traditional membership organization." (internal quotation marks omitted); *Funeral Consumers All., Inc. v. Serv. Corp. Intern.*, 695 F.3d 330, 353 n.9 (5th Cir. 2012) ("If the association seeking standing does not have traditional members, as here, the association established its standing by proving that it has 'indicia of membership'…." (citing *Hunt*, 432 U.S. at 344-45)); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999) (holding that a congressionally chartered organization with no formal members had associational standing because members possessed indicia of membership).

But as this Court initially found, this is not a situation "in which the adequacy of [SFFA's] representativeness is so seriously in doubt that the Court should consider *Hunt*'s indicia-of-membership analysis or some other criteria to evaluate the issue of associational standing." *Students for Fair Admissions, Inc.*, 261 F. Supp. 3d at 110. Harvard's argument rests on a misplaced assumption that an organization's members need to participate regularly, or at all, to qualify as members. *See AARP v. EEOC*, 267 F. Supp. 3d 14, 23 (D.D.C. 2017) ("[C]ourts do not appear to analyze to what

extent an identified member partakes in membership activities in determining whether an organization has associational standing.").

SFFA, unlike the Commission in *Hunt*, is a traditional membership organization. Under SFFA's bylaws, a person can become a member simply by providing their personal information through its website and paying an initial, one-time contribution of ten dollars. A person must also seek to support SFFA's mission and purpose to which SFFA has submitted several declarations from its members stating their support for the organization. As of this date, SFFA has roughly 20,000 members. The mere fact that SFFA's members are not members as defined by Virginia state law does not preclude its ability to assert associational standing. *See AARP*, 267 F. Supp. 3d at 22-23 (explaining that no case law exists suggesting that to be considered a "membership" organization, for purposes of standing, a "member" must be defined under state law); *see also Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) (holding non-profit corporation had associational standing whose constituency were not "members" as defined by state law).

Accordingly, because this Court need not apply *Hunt*'s indicia-of-membership test, Harvard's motion for summary judgment as to SFFA's standing should be denied.

II. SUMMARY JUDGMENT AS TO COUNT III

A. Legal Standard

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in programs or activities that receive federal funds. 42 U.S.C. § 2000d. The purpose of Title VI is to "halt federal funding of entities that violate a prohibition of racial discrimination" under the Equal Protection Clause of the Fourteenth Amendment. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 284, 287 (1978) (plurality opinion).

The Equal Protection Clause provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because racial

characteristics rarely justify disparate treatment, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989) (plurality opinion), Harvard's consideration of race in its admissions process must be analyzed under strict scrutiny, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). To meet strict scrutiny, Harvard's use of race must be narrowly tailored to further a compelling interest. *Id.* A court is to give "a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328-29. Although the use of race is subject to strict scrutiny, it is not invalidated merely by its use. *Id.* at 326-27. Strict scrutiny instead provides a framework for "carefully examining the importance and the sincerity of the reasons advanced by [a university] for the use of race in that particular context." *Id.* at 327. And when race-based action is necessary to further a compelling interest, "such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied." *Id.*

1. Compelling Interest

To begin, Harvard argues that its decision to use race is to achieve the educational benefits that flow from student body diversity by exposing its students to "new ideas, new ways of understanding, and new ways of knowing, and prepares [its students] to assume leadership roles in the increasingly pluralistic society into which they will graduate." Harvard Mem. Summ. J. 18 (internal quotation marks and citations omitted).

The Court has repeatedly held that a university has a compelling interest in instituting "a race-conscious admissions program as a means of obtaining the 'educational benefits that flow from student body diversity.'" *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (*Fisher II*) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (*Fisher I*)); *see Grutter*, 539 U.S. at 325 ("[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions."); *Bakke*, 432 U.S. at 284 ("[T]he interest of diversity is compelling in the context of a university's admissions program….").

The Court first articulated this principle in *Regents of University of California v. Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.).[1] There, the medical school at the University of California at Davis had two separate admissions processes for evaluating its applicants—the regular admissions process and the special admissions program. *Id.* at 272. Under the regular admissions process, applicants were evaluated by various objective and subjective factors, leaving them to compete for 84 out of 100 seats in the entering class. *Id.* at 273. Applicants who expressed that they came from certain minority groups were evaluated under a race-conscious, special admissions program, which reserved the remaining 16 seats to students who were members of those groups. *Id.* at 274-75.

Justice Powell approved the medical school's last reason for using race to further only one interest—"the attainment of a diverse student body."[2] *Bakke*, 438 U.S. at 311-12. Justice Powell found important the long-held view that the First Amendment protects a university's academic freedom to make its own judgment, including "the selection of its student body." *Id.* at 312; *see also Grutter*, 539 U.S. at 329 ("[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). The "nation's future," Justice Powell explained, "'depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 312 (quoting *Keyishian v. Board of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967)). In seeking to promote robust exchange among a diverse population of students, a university is "seeking to achieve a goal that is of paramount importance in the fulfillment of its mission." *Bakke*, 438 U.S. at 313.

[1] All further references to *Bakke* are to Justice Powell's opinion, unless otherwise specified.

[2] Although *Bakke* was a plurality opinion, the Court later held in *Grutter* that Justice Powell's opinion was the holding in *Bakke*. *Grutter*, 539 U.S. at 322-23, 25.

Here, the record reveals that Harvard has articulated precise goals consistent with Justice Powell's opinion in *Bakke*. In particular, "Harvard seeks to admit 'students who are diverse on a variety of realms so that they play as important a part in educating one another through their experience together as we play in what we offer them within a classroom.'" Harvard's SMF ¶¶ 84, 85. In fact, in 2015, Harvard established a committee to analyze the importance of student diversity, which "'emphatically embrace[d] and reaffirm[ed] the University's long-held view that student body diversity—including racial diversity—is essential to our pedagogical objectives and institutional mission.'" Harvard's SMF ¶¶ 87-89. Ultimately, the Committee concluded that diversity "'enhances the education of all of our students, it prepares them to assume leadership roles in the increasingly pluralistic society into which they will graduate, and it is fundamental to the effective education of the men and women of Harvard College.'" Harvard's SMF ¶ 90.

Accordingly, giving deference to Harvard's academic freedom in seeking to achieve a diverse student body by educating and exposing its students through differing experiences, it is a compelling interest that falls within the "constitutionally permissible goal for an institution of higher education." *Bakke*, 488 U.S. at 311-12.

2. Narrow Tailoring

Even if Harvard has a compelling interest for having a race-conscious admissions process, "the means chosen to accomplish [its] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280 (1986). The narrow tailoring requirement ensures "that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *J.A. Croson Co.*, 488 U.S. at 472. To be narrowly tailored, Harvard's use of race cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants," *Bakke*, 438 U.S. at 315, but must be "flexible enough to consider all pertinent

elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight," *id.* at 317. "[N]o deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals." *Fisher II*, 136 S. Ct at 2208 (citing *Fisher I*, 570 U.S. at 2419-20).

a. Analysis of Count III

SFFA argues that it is entitled to summary judgment on Count III for two reasons. First, Harvard does not use race to achieve a "critical mass of underrepresented students … so as to realize the educational benefits of a diverse student body." SFFA Mem. Summ. J. 39, 40 (quoting *Grutter*, 539 U.S. 36 (2003)). Second, Harvard is not using race merely as a "plus factor" but rather as a "predominant factor" in its admissions process because race plays a disproportionately significant role in admissions for African American and Hispanic applicants when compared to Asian-American applicants. SFFA Mem. Summ. J. 40.

Harvard argues it is entitled to summary judgment on Count III because "race is but one factor among many that are considered flexibly in the admissions process," Harvard Mem. Summ. J. 36-37, while still comparing its applicants against all others, *id.* at 38. Because SFFA's and Harvard's arguments mirror the arguments in each of its motions and oppositions, they will be analyzed collectively.

I first turn to SFFA's argument that Harvard's goal is not compelling because it is not using race to achieve a "*critical mass* of underrepresented minority students ... so as to realize the educational benefits of a diverse student body." SFFA Mem. Summ. J. 39, 40 (quoting *Grutter*, 539 U.S. at 318 (emphasis added)). SFFA relies on deposition testimony from various Harvard leaders who testified that they have never heard the term "critical mass," SFFA SMF ¶ 159, do not know what it means, SFFA SMF ¶¶ 160-62, and is not a concept used in their admissions process, SFFA

SMF ¶¶ 158, 160-61, 163-164. In making this argument, SFFA places strong emphasis on the term critical mass.

The term "critical mass" first appeared in the Court's opinion in *Grutter v. Bollinger*, 539 U.S. 306 (2003). There, the University of Michigan Law School adopted an admissions policy that sought to enroll a "critical mass of [underrepresented] minority students … to ensur[e] their ability to make unique contributions to the character of the Law School." *Id.* at 316 (internal quotation marks omitted). In holding that the law school's use of race was compelling, the Court explained that the university's use of race—to enroll a critical mass of underrepresented minorities—was intended to achieve the "educational benefits that diversity is designed to produce." *Id.* at 330. The Court ultimately found that the law school's policy to achieve a "critical mass" was narrowly tailored to achieve its interest because it promoted cross-racial understanding, broke down racial stereotypes, and enabled students to better under persons of different races. *Id.*

SFFA's argument, however, relies on a narrow and misplaced reading of *Grutter*. The Court's language in *Grutter* did not limit the way a university may consider race in its admissions process. Instead, *Grutter* simply reaffirmed *Bakke*'s earlier principle that a university may consider race, so long as it is intended to achieve the "educational benefits that diversity is designed to produce." *Grutter*, 539 U.S. at 330. The Court rejected a similar argument in *Fisher II* that the University of Texas at Austin had not used race to achieve a precise "level of minority enrollment that would constitute 'critical mass.'" *Fisher II*, 136 S. Ct at 2210. "As this Court's cases have made clear," the Court explained, "the compelling interest that justified consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity." *Id.* (citing *Fisher I*, 570 U.S. at 310) (internal quotation marks omitted). The Court further elaborated that "[i]ncreasing minority enrollment may be instrumental to these

educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained." *Fisher II*, 136 S. Ct. at 2211.

Therefore, while the statements from Harvard's leaders demonstrate that Harvard does not use race to achieve a critical mass like the law school in *Grutter*, Harvard may use race in a different manner so long as it is narrowly tailored to achieve "'the educational benefits that flow from student body diversity.'" *Id.* at 2210 (quoting *Fisher I*, 570 U.S. at 310).

I now turn to SFFA's and Harvard's arguments about whether Harvard uses race as a "plus factor" in its admissions process. The Court has held that a university may consider race in its admissions process "only as a *plus* in a particular applicant's file, without insulat[ing] the individual from comparison with all other candidates for the available seats." *Grutter*, 539 U.S. at 334 (italics added) (internal quotation marks omitted). "[A]n admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" *Id.* (quoting *Bakke*, 432 U.S. at 2733). This means that Harvard "cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks." *Id.*; *see also Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (holding the automatic distribution of 20 points for an applicant's race was not narrowly tailored to achieve the interest in educational diversity).

Here, the record reveals there is a genuine dispute about whether Harvard uses race merely as a "plus" factor in its admissions process. According to Harvard, each applicant must go through the same three-step review process, and no student is placed on a separate track based on his race or

ethnicity. Various admissions officers—who are trained to evaluate each student individually and holistically—assign a score to an applicant's academic, extracurricular, athletic, and personal achievements, all consisting of objective and subjective considerations. These profile ratings are not viewed in isolation, and instead, are considered in the context for which they are achieved. Race is completely excluded from this initial calculation. It is not until a score is given for a student's overall rating is race considered—that is, if a student chooses to even disclose that information. Like race, various other factors play significant roles in a student's admissions, including high academic, extracurricular, athletic, and personal ratings; an applicant's legacy status; an applicant's relationship to someone who donated money or assets; and whether an applicant has a family member who works for the college. But Harvard neither applies an automatic or mechanical score, nor does it reserve a certain number of seats based on an applicant's race.

Indeed, Harvard's expert, Dr. David Card, conducted a statistical analysis of Harvard's admissions process and concluded that "to be admitted to Harvard, applicants must have multiple areas of strength, and race is not a determinative factor." Harvard SMF ¶ 121. His analysis found that race alone does not determine whether an applicant is admitted, and that numerous other characteristics are better predictors of Harvard's admissions decisions. Harvard SMF ¶ 122. Dr. Card also found that race *may* be determinative for the most competitive applicants just as other factors would such as top academic, extracurricular, or personal ratings. Card Report ¶ 181; Harvard SMF ¶ 125. Dr. Card also observed, however, that race has relatively no impact for those who were rated in the lower deciles of the admissions pool. Card Rebuttal ¶ 144.

According to SFFA, however, Harvard's use of race has a disproportionate advantage for African American and Hispanic applicants. Dr. Peter Arcidiacono's statistical analysis revealed that racial preferences are responsible for quadrupling the chances for African American applicants and doubling the chances for Hispanic admits. Arcidiacono Rebuttal at 46-47. For example, an

Asian-American male, who was not disadvantaged, and whose characteristics result in a 25% chance of admissions, would increase to 75% if treated as a Hispanic applicant, and more than 95% if treated as an African-American applicant. SFFA SMF ¶ 737. Moreover, according to Dr. Arcidiacono, OIR reports suggest that race is being used as more than a "plus" factor. *See* SFFA SMF ¶¶ 417-19, 448. Some of those reports' findings found that race may be the strongest factor for African American and Hispanic applicants. SFFA SMF ¶¶ 417, 418. The OIR report also suggested, however, that high personal ratings, extracurricular ratings, and academic ratings and legacy status play additional significant roles for certain applicants. SFFA SMF ¶ 448.

This record shows that there is a genuine dispute as to how Harvard uses race in its admissions process. Although the record weighs strongly in finding that Harvard uses race only as a "plus" factor and is thus narrowly tailored to fit Harvard's compelling interest for student body diversity, that factual determination is one that should be left for the jury. And while a conflict between expert testimony will not always create a triable issue of fact for a jury to decide, *see U.S. v. Articles of Drug Consisting of Following: 5,906 Boxes*, 745 F.2d 105, 120 n.22 (1st Cir. 1984), the reliability, credibility, and accuracy of Dr. Card's and Dr. Arcidiacono's expert conclusions and findings are also material facts that should be left for a jury to decide.

Accordingly, this Court should deny SFFA's and Harvard's cross-motions for summary judgment on Count III.

Applicant Details

First Name	**Dominique**
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Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**6306059377**

Applicant Education

BA/BS From	**University of Notre Dame**
Date of BA/BS	**May 2019**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Journal of Constitutional Law and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Dominique Estes
University Drive, 22A
Durham, NC 27707
June 16, 2021

The Honorable Elizabeth Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes,
I have just completed my 2L year at Duke University School of law. I am writing to apply for a 2022-23 term clerkship in your chambers. I have experience working as a staff editor on the Duke Law Journal of Constitutional Law and Public Policy, and I hope to pursue appellate defense/post-conviction work after a clerkship. I am particularly interested in clerking in Virginia, as I hope to work in the D.C. area after graduation.
Enclosed please find my resume, law school and undergraduate transcripts, writing sample, and three letters of recommendation.
If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,
Dominique Estes

Dominique Estes

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788 Torrington Dr
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EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected with Public Interest and Public Service Certificate, May 2022
GPA: 3.36
Activities: Duke Journal of Constitutional Law and Public Policy, Staff Editor
Judicial Board and Appeals Committee, 3L Representative
Government and Public Service Society, Executive Board Member
Fair Chance Project, Volunteer
LEAD Fellow

University of Notre Dame, South Bend, Indiana
Bachelor of Arts in Political Science with Honors, *magna cum laude*, May 2019
GPA: 3.87
Thesis: "I Don't Know What The Social Contract Means, And At This Point I'm Too Afraid To Ask"
Study Abroad: Notre Dame Washington Program, Washington, D.C., Fall 2017
Summer Study Abroad, Poland, Summer 2018
Honors: Paul Bartholomew Prize for Best Thesis in Political Theory
Activities: Notre Dame Mock Trial, Attorney/Witness

EXPERIENCE

Illinois Office of the Appellate Defender, Chicago, IL
Legal Intern, Summer 2021
Drafting reply briefs in direct appeals and appeals from post-conviction proceedings; assisting attorneys with other assigned research and writing projects and oral argument preparation.

Duke Law Wrongful Convictions Clinic, Durham, NC
Student Attorney, Spring 2021
Drafted and edited a motion for appropriate relief detailing the factual and legal bases of various Due Process violations in our client's case which has spanned nearly 25 years.

North Carolina Department of Justice – Civil Division, Education Section, Durham, NC
Legal Intern, May 2020 – July 2020
Composed research memoranda for multiple employment actions and a criminal appellate brief; reviewed discovery documents, compiled a timeline of events, prepared witnesses for deposition, and drafted a plaintiff's deposition outline for a failure to hire claim; and provided answers to legal questions from the State Board of Education.

Department of Justice – Civil Rights Division, Voting Section, Washington, D.C.
Volunteer Undergraduate Intern, September 2017 – December 2017
Researched potential Section 2 violations of the Voting Rights Act, reviewed over a thousand discovery documents, and monitored polling places in Fairfax County.

ADDITIONAL INFORMATION

Dog lover, makeup enthusiast. Enjoys thrifting and bad teen rom-coms (*see* The Kissing Booth).

Duke University

Official Transcript

Name: Dominique Estes
Student ID: 2521887
Print Date: 06/06/2021

Academic Program

Program: Law School — Status: Active in Program
Plan: Law (JD)

Beginning of Law School Record

2019 Fall Term

Course		Description	Earned	Grade
LAW	110	CIVIL PROCEDURE	4.500	3.3
LAW	130	CONTRACTS	4.500	3.2
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR
LAW	180	TORTS	4.500	3.3
Term GPA	3.266	Term Earned	13.500	13.500

2020 Spring Term

Course		Description	Earned	Grade
LAW	101	FOUNDATIONS OF LAW	1.000	CR
LAW	120	CONSTITUTIONAL LAW	4.500	CR
LAW	140	CRIMINAL LAW	4.500	CR
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.3
LAW	170	PROPERTY	4.500	CR
Term GPA	3.300	Term Earned	18.500	18.500

2020 Fall Term

Course		Description	Earned	Grade
LAW	238	ETHICS/LAW OF LAWYERING	2.000	3.4
LAW	245	EVIDENCE	4.000	3.4
LAW	314	FEDERAL HABEAS CORPUS	3.000	3.4
LAW	405	APPELLATE PRACTICE	3.000	3.5
LAW	611	READINGS	1.000	CR
Topic:		Transgender Issues		
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR
Term GPA	3.425	Term Earned	13.000	13.000

2021 Spring Term

Course		Description	Earned	Grade
LAW	226	CRIM PROCEDURE: INVESTIGATION	3.000	3.6
LAW	229	LAW OF STATE/LOCAL GOVERNMENT	3.000	3.6
LAW	342	FEDERAL COURTS	4.000	3.2
LAW	493	WRONGFUL CONVICTIONS CLINIC	4.000	3.3
LAW	873	PROSECUTORIAL ETHICS	0.500	CR
Term GPA	3.400	Term Earned	14.500	14.500

Law School Career Earned
Cum GPA: 3.356 **Cum Earned 59.500**

End of Official Transcript

THE NAME OF THE UNIVERSITY APPEARS IN WHITE ACROSS THE FACE OF THIS 8 1/2 X 11 DOCUMENT

A BLACK AND WHITE DOCUMENT IS NOT OFFICIAL

THE OFFICIAL SIGNATURE IS WHITE AND IS IMPOSED UPON THE INSTITUTIONAL SEAL

Dominique Estes

Frank Blalark, University Registrar

DUKE UNIVERSITY TRANSCRIPT GUIDE

CREDIT, ALL SCHOOLS: The Graduate and Professional Schools, except for the Divinity School, list credit in semester hours. Prior to 1969, credit for Trinity College of Arts & Sciences, the Pratt School of Engineering, and the Divinity School was recorded in semester hours. A semester-hour unit represents one lecture or recitation period of 50 minutes per week for a fifteen-week semester or its equivalent. Beginning Fall 1969, credit for Trinity, Pratt, and the Divinity School has been listed in semester-courses.

NOTE: One semester-course credit unit is equivalent to four semester hours.

UNDERGRADUATE LOAD AND COURSE NUMBERING SYSTEM: Since 1969, the normal undergraduate load has been four semester-course credits per semester. Full-time status requires three or more semester-course credits. For undergraduate matriculants from Fall 1969-Summer 1988, the graduation requirement was 32 semester-course credits; for matriculants in Fall 1988 and after, it is 34. From 1930-2012, introductory-level courses are numbered below 100; advanced-level courses are numbered 100 and above. Courses numbered 1-49 were primarily for first-year students; courses numbered 200-299 were primarily for seniors and graduate students. Effective Fall 2012, undergraduate (Trinity and Pratt), Graduate School, Nicholas School of the Environment, Sanford School of Public Policy, Divinity School and Fuqua School of Business courses were renumbered. In the new numbering scheme, courses numbered at the 100 level and below are introductory courses; 200- and 300-level courses are above introductory; 400-level courses are advanced undergraduate, capstone-type courses typically taken by seniors; 500- and 600-level courses are graduate courses open to advanced undergraduates; courses numbered 700 and above are for graduate students only. A more detailed description of the course numbering scheme and process can be found at the following website: http://admin.trinity.duke.edu/course-renumbering.

DUKE KUNSHAN UNIVERSITY: Beginning Summer 2014 Duke University began offering graduate and professional degree programs and undergraduate semester programs at Duke Kunshan University, in Kunshan, China. Credits and degrees are awarded through Duke University and are displayed as such on Duke University transcripts, with a notation indicating the coursework was taken through Duke Kunshan University.

GRADING SYSTEMS

Spring 2020: COVID-19 required changes to enrollment patterns and grading.

UNDERGRADUATE

Trinity College of Arts & Sciences, Pratt School of Engineering, the School of Nursing, and the Woman's College:

1967-present				1930-1955		Quality Points per semester hour
A+	4.0	C+	2.3	A	Exceptional	3
A	4.0	C	2.0	B	Superior	2
A-	3.7	C-	1.7	C	Satisfactory	1
B+	3.3	D+	1.3	D	Low Pass	0
B	3.0	D	1.0	F	Failure	
B-	2.7	D-	1.0	(1955-1967, quality points per semester hour carried one more point per semester hour.)		
		F	0.0			

In 1972, Trinity College and the Woman's College merged into the coeducational Trinity College of Arts & Sciences.

GRADUATE AND PROFESSIONAL

The Graduate School, Pratt School of Engineering, Nicholas School of the Environment, and Sanford School of Public Policy:

Summer 2004-present				Through Spring 2004	
A+	4.0	B-	2.7	E	Excellent
A	4.0	C+	2.3	G	Good
A-	3.7	C	2.0	S	Satisfactory
B+	3.3	C-	1.7	F	Failure
B	3.0	F	0.0	P	Passing (Pass/Fail Course)

From Fall 1967, plus and minus signs have been possible. Through Spring 2004, the undergraduate grading system applies when a graduate student takes a course at the 100 level. All students admitted to The Graduate School, the Engineering Management program, and Sanford School of Public Policy in Summer 2004 and later will have a grade point average calculated, based on the scale noted above. No GPA is calculated for students admitted to those schools prior to Summer 2004. The Nicholas School of the Environment does not calculate a GPA.

The Fuqua School of Business:

Sept. 1980-present			Sept. 1977-Sept. 1980	
SP	4.0	Superior	A	Excellent
HP	3.5	High Pass	B	Superior
P	3.0	Pass	C	Average
LP	2.5	Low Pass	D	Low Pass
F	0.0	Failure	F	Failure

Prior to September 1977, the School of Business Administration used the same grading system as the Graduate School.

The Divinity School:

Fall 1971-present: the Divinity School has employed the same grading scale as the undergraduate schools.

1951-Fall 1971		Before 1951	
A	Excellent	E	95-100
B	Superior	G	85-94
C	Average	S	70-84
D	Inferior	F	69 & below
F	Failure		

The School of Nursing:

Spring 1993-present			
A	4.0	C+	2.3
A-	3.7	C	2.0
B+	3.3	C-	1.7
B	3.0	F	0.0
B-	2.7		

From 1974-1992, plus and minus signs were not used.

The Law School:

Fall 2013-present	
4.1-4.3	Exceptional (<= 5% of any course with 40 or more students)
2.0-4.0	Passing in ascending order of proficiency
1.5	Failing

Fall 2004-2013	Fall 1989-2004	
4.1-4.3	4.1-4.5	Exceptional (<= 5% of any course with 40 or more students)
1.6-4.0	1.6-4.0	Passing in ascending order of proficiency
1.1-1.5	1.1-1.5	Failing

Fall 1971-Fall 1989		
3.5-4.0	H	Honors
2.7-3.4	HP	High Pass
1.8-2.6	P	Pass
1.3-1.7	LP	Low Pass
1.0-1.2	F	Failure

OTHER SYMBOLS (all schools):

—	Completed
*	No Credit
AD	Audited
AP	Advanced Placement Program Credit
CR	Credit Only
I	Incomplete
IPC	International Placement Credit
N	No grade reported at this time from instructor
NC	No Credit
P	Pass - in Pass/Fail course (after 1966)
S	Satisfactory - in Satisfactory/Unsatisfactory course (for undergraduates beginning Fall 2010)
TR	Transfer Credit
U	Failure - in Pass/Fail course (after 1966); Unsatisfactory - in Satisfactory/Unsatisfactory course (for undergraduates beginning Fall 2010)
W	Withdrew from course
WA	Withdrew from an Audited course
WE	Withdrew, Student Registration Error
WF	Withdrew, Failing (after 1974)
WI	Withdrew, Illness
WP	Withdrew, Passing (after 1974)
X	Absent from Examination (with excuse)
Z	Year-long course, grade given next semester

ACCREDITATION: Duke University is accredited by the Southern Association of Colleges and Schools, Atlanta, GA 30365.

Office of the University Registrar
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Revised March 2020

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 17, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Dominique Estes

Dear Judge Hanes:

I am pleased to write this letter recommending Dominique Estes for a clerkship in your chambers. Dominique is a strong student, serves as a leader in the Duke Law community, and has a demonstrated commitment to the public interest. She is also a pleasure to engage both in and out of class—warm, sincere, well-read, and full of good humor. I believe that she will be a successful clerk and hope that you will have the opportunity to meet her.

I first got to know Dominique when she was a student in my Evidence class this past fall. In Evidence, the students evaluate the text, legislative history, and common law roots of the rules, study their development in the courts, and then apply them through practice problems. Although it is a large lecture class and was conducted entirely on Zoom this year, it is structured to ensure regular substantive exchanges with individual students. The evaluation process includes assessments of written advocacy, oral presentation, and knowledge of the complex mechanics of the rules.

Dominique consistently participated in class, had productive comments and questions, and calibrated her contributions well for the Zoom environment. Outside of class, she often had focused questions that demonstrated deep engagement with the material. And she regularly read beyond the four corners of the assignments, followed pending cases, and shared useful materials. Dominique also did very well on the objective (multiple choice) assessments throughout the semester and wrote essays on the final exam that demonstrated both persuasive writing skills and creative analysis.

I have also had the opportunity to evaluate Dominique in the context of a smaller class this spring, and I have been especially impressed with her passion for criminal procedure issues and her knowledge of the criminal justice system. My Criminal Procedure: Investigation class focuses on the Fourth Amendment's restrictions on search and seizure, the Fifth Amendment's guarantee against compelled self-incrimination, and the impact of the Sixth Amendment's right to counsel on eyewitness identification procedures and questioning by law enforcement. Dominique was again a productive and regular participant, always prepared for class, and asked incisive questions about the doctrine. She also did excellent work on the exam, demonstrated solid understanding of the doctrine, and wrote clearly and expressively throughout.

Dominique also manages her time well and has balanced demanding courses with a wide range of campus activities. She is a Staff Editor for the *Duke Journal of Constitutional Law and Public Policy*, works with the Wrongful Convictions Clinic, is an Executive Board Member of the Government and Public Service Society, volunteers with the Fair Chance Project, and was selected as a LEAD Fellow to mentor first year students. She has also dedicated her summers to public service, with an internship at the North Carolina Department of Justice and a position this summer with the Illinois Office of the Appellate Defender.

In short, Dominique is an impressive candidate with a sincere dedication to understanding and improving the law, an engaging personality, and an intriguing range of interests. I am confident she will be an asset to your chambers, and I hope you will not hesitate to contact me if I can provide any further information about her candidacy.

Sincerely,

Lisa Kern Griffin
Candace M. Carroll and Leonard B. Simon
Professor of Law

Lisa Griffin - Griffin@law.duke.edu - 919-613-7112

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 17, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Dominique Estes

Dear Judge Hanes:

I am writing to offer my enthusiastic recommendation for Dominique Estes, a rising third-year student at Duke Law School who has applied for a judicial clerkship with you. Dominique is a very talented and thoughtful young woman who will be a great asset to your chambers.

Last spring, Dominique was a student in my Property Law course. Our class met three times a week for lengthy sessions, and we had eight weeks of classes before we went to remote classes in mid-March due to the pandemic. Dominique performed well when called on, volunteered regularly, and was always prepared. After we shifted to Zoom for class, she remained fully engaged, following up after class with questions that delved into the nuances of issues we discussed. The exam for the course was a typical law school exam with three questions, two involving complex and lengthy hypotheticals, and one focusing on policy. Although I could not assign Dominique a grade because we shifted to a pass/fail system for the semester in response to the pandemic, I reviewed all exams closely and can confirm that her exam demonstrated a solid understanding of complex legal doctrine. In the two questions with hypotheticals, she was able to articulate and apply appropriate balancing tests for liability and remedy on a nuisance claim, evaluate various doctrines relating to easements, accurately apply the Rule Against Perpetuities to an ambiguous conveyance, and work through potentially conflicting alternatives to determine rights of the parties. In the third question, which asked students to articulate arguments for and against a Takings claim and decide how the matter should be resolved, she was thorough in setting forth the parties' arguments and recommending which party should prevail and why.

Last fall, Dominique was in my Ethics and the Law of Lawyering course, where she again demonstrated her intellectual capabilities. Although the course is taught in primarily a lecture format, students were expected to submit written responses to three complex problems in the textbook, as well as a written policy paper relating to a current issue in the legal profession. Because the class fulfills our mandatory professional responsibility requirement, students sometimes are not overly enthusiastic about the course. Dominique was an exception, participating actively in class, seeking me out after class with cogent questions and comments, and performing well on each of the written assignments and the exam.

Dominique's activities outside the classroom also reflect her many talents. Her writing skills are confirmed by her position as a Staff Editor on the Duke Journal of Constitutional Law and Public Policy. She has been actively involved in student organizations that reflect her dedication to pro bono work and public service, including service in our acclaimed Wrongful Convictions Clinic and a leadership role in the Government and Public Service Society.

Dominique hopes to build a career in criminal defense law, and to that end is working this summer with the Illinois Office of the Appellate Defender. Her ultimate dream is to serve as a judge. She came to law school intending to seek a judicial clerkship, because she understands the importance of a judicial clerkship to her chosen path and appreciates all a clerkship can teach her. As a former judicial law clerk and law firm litigation partner myself, I am excited about Dominique's decision to seek a clerkship with you.

Throughout the last year, I have been consistently impressed by Dominique's many skills. She is self-confident, has good instincts, and is hardworking. She is intellectually curious and interested in a wide range of legal topics. She is enthusiastic about everything she learns and does. As if that were not enough, she is also simply a very nice young woman who will be a delight to work with in chambers every day.

Kathryn Webb Bradley - Kbradley@law.duke.edu - (919) 613-7014

For all of these reasons, I urge you to give Dominique your most serious consideration. If you have any questions or would like to discuss Dominique further, please do not hesitate to contact me.

Sincerely yours,

Kathryn W. Bradley
Professor of the Practice of Law

Kathryn Webb Bradley - Kbradley@law.duke.edu - (919) 613-7014

Dominique Estes
3611 University Dr, 22A
Durham, NC 27707
(630)-605-9377
dominiqueestes7@gmail.com

Writing Sample

This is an excerpt from an appellate brief I drafted for my Appellate Practice class. The class assigned students to argue *Archdiocese of Washington v. Washington Metro Area Transit Authority* on appeal from the district court.

In November 2017, the Archdiocese of Washington applied to have a Christmas advertisement run by the Washington Metro Area Transit Authority (WMATA). WMATA rejected the advertisement on the grounds that it violated its advertising policy; specifically, guideline 12 of WMATA's advertising policy banned all religious advertising. The Archdiocese argued the policy violated the First Amendment's Free Speech and Free Exercise Clauses and the Restoration of Religious Freedom Act; our class addressed only the Free Speech and Free Exercise questions. The district court denied the Archdiocese's motion for the preliminary injunction, and the Archdiocese appealed.

My brief is for the appellee, WMATA. The full brief is 27 pages. This excerpt, from the beginning sections of the argument, addresses the Archdiocese's Free Speech claim, explaining how guideline 12 is facially viewpoint neutral. The section following this excerpt discusses WMATA's application of the policy.

ARGUMENT

The District Court was correct to deny the Archdiocese's motion for a preliminary injunction. Because a preliminary injunction is an "extraordinary remedy," it cannot be granted if the moving party is not clearly entitled to relief. *Winter*, 555 U.S. at 22. The Archdiocese is not likely to win on its claims. This court should affirm.

I. The Archdiocese is not likely to succeed on the merits of its Free Speech Claim.

The Constitution treats government regulation of speech differently in public and non-public forums. *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 800 (1985). Freedom of expression is greatest in public forums, while non-public forums can put greater restrictions on speakers. *Id*. Bus advertising space is a non-public forum, established in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and *Perry Educational Association v. Perry Local Educator's Association*, 460 U.S. 37 (1983). The Archdiocese also ceded this fact in proceedings below. JA 337.

Within non-public forums, the government is free to regulate subject matter and speaker identity if the regulations are viewpoint-neutral and reasonable in light of the purposes of the forum. *Cornelius*, 555 U.S. at 800. Content discrimination, which is permissible, occurs when the government regulates speech based on the topic discussed or the message conveyed, whereas viewpoint discrimination, which is constitutionally suspect, occurs when the government regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

A. Guideline 12 restricts advertisements with religious content while remaining viewpoint neutral.

WMATA's guidelines prohibit many types of content. Guideline 9 prohibits any "advertisements intended to influence members of the public regarding an issue on which there are varying opinions." JA 209. Then guidelines 10–14 detail certain prohibited subjects. Guideline 10 prohibits ads that promote tobacco products; guideline 11 prohibits ads that "support or oppose any political party or candidate"; guideline 12 prohibits ads that "promote or oppose any religion, religious practice or belief"; guideline 13 prohibits ads that "support or oppose any industry position or industry goal without any direct commercial benefit to the advertiser"; and guideline 14 prohibits ads that intend to "influence public policy." JA 209.

Guideline 12 is surrounded by these other content prohibitions. Guideline 9 encompasses guidelines 11–14; each of these subjects—political parties or candidates, religion, industry positions, and public policies—is an "issue on which there are varying opinions." Anything prohibited by guidelines 11–14, including religious ads, is already prohibited by guideline 9. This reading of the guidelines is supported by WMATA's order temporarily suspending issue-oriented ads, which stated, "the Board hereby directs management to close WMATA's advertising space to any and all issue-oriented advertising, including but not limited to, political, religious and advocacy advertising until the end of the calendar year." JA 204. The Archdiocese does not need to challenge the constitutionality of guideline 9, but the context surrounding guideline 12 is necessary to understand the purpose and operation of WMATA's ban on religious speech and to understand how guideline 12 stands in relation to similar cases.

i. Guideline 12 is facially viewpoint-neutral

WMATA's advertising policy, as a whole, is structured to be viewpoint neutral. The guidelines do not favor some messages over others. The guidelines prohibit ads that intend to "influence members of the public regarding an issue on which there are varying opinions." JA 209. "Issue" means "a vital or unsettled matter," "a matter that is in dispute between two or more parties," or "a subject or problem that people are thinking and talking about."[1] A "viewpoint" is "a position or perspective from which something is evaluated."[2] By excluding issues, the guidelines equally exclude all viewpoints on those issues. Thus, the guidelines are viewpoint neutral.

Guideline 12 works the same way. The prohibition on religious ads bans religion as a subject, not as a viewpoint. Guideline 12 covers any advertisements that would "promote or oppose any religion, religious practice or belief." WMATA will not feature ads that take any position on religion, just as it will not feature ads that take any position on animal testing in cosmetics or carbon emissions. This is not viewpoint discrimination; it is content discrimination, and it is constitutional in non-public forums.

Guideline 12 is distinct from the regulations struck down by the Supreme Court's various decisions on religious speech in non-public forums. In *Lamb's Chapel*, a school district allowed "social, civic, or recreational uses [...] and use by political organizations." 508 U.S. 384, 387 (1993). Having opened a non-public forum for these broad purposes, the school district then specifically denied access for "religious purposes." *Id.* When Lamb's Chapel, a church, wanted to use school grounds to screen a film-series about media influence and the importance of Christian values, the district denied the request. *Id.* at 387–388. The district's rules would have

[1] https://www.merriam-webster.com/dictionary/issue, last visited October 28, 2020
[2] https://www.merriam-webster.com/dictionary/viewpoint, last visited October 28, 2020

allowed a lecture or film about child rearing and family values from a non-religious perspective, since those events would qualify as a social or civic use. *Id.* at 393–394. The Supreme Court held that this was viewpoint discrimination. *Id.* at 394. Family and parenting were the subjects of the film, and the district's rules created a broad non-public forum that allowed discussions on parenting, family relationships, and child-rearing. It was unconstitutional for the district to restrict otherwise permissible speech based on the Christian approach to the topic (without a compelling interest to do so). The Court struck down a nearly identical rule in *Good News Club v. Milford*, applying the same legal analysis to after-school religious groups. *See generally*, *Good News Club*, 533 U.S. 98 (2001).

Similarly, *Rosenberger v. Rector and Visitors of the Univ. of Va.* featured a non-public forum that provided certain funds to all student newspapers but denied funding to a newspaper which was engaged in a "religious activity." 515 U.S. at 824–825. The rules defined "religious activity" to mean an activity that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 822. Although the University's rules also barred certain political activities, they explicitly stated that the restrictions on those activities were not intended to "preclude funding of any otherwise eligible student organization which espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted." *Id.* at 825.

The Christian newspaper in *Rosenberger* included a variety of subjects, including racism, crisis pregnancy, stress, sexual orientation, eating disorders, missionary work, prayer, and religious music. *Id.* at 826. Other newspapers were free to write on these subjects from any other perspective; a political student paper could write about the colonialist history of mission

work, and an entertainment and culture section could review religious music. The newspaper was denied funding only because it had a Christian perspective.

The *Rosenberger* Court also acknowledged that the distinction between viewpoint and content is not precise. *Id.* at 831. Religion, as a whole body of thought on the origins and nature of human life, is not always merely a viewpoint or perspective on some other subject. *Id*. So, it is important to understand how the content-viewpoint distinction works in advertising.

Advertising necessarily promotes or opposes something. Advertisements are not neutral. They are never indifferent. Ads are intended to influence thought and behavior—usually, consumer behavior. Commercial ads promote a product or service. Issue-oriented ads promote or attack ideas. An advertisement about tobacco will be for or against tobacco; even a tobacco ad that merely states facts intends to make consumers like or dislike tobacco. The content of an ad is the product or idea being promoted or opposed, while the viewpoint of an ad is the stance taken towards that product or idea, promoting or opposing it, and the various reasons one might have for promoting or opposing it. The sum of all advertisements about tobacco would be equal to all ads promoting tobacco and all ads opposing tobacco. Therefore, a ban on ads promoting or opposing tobacco products would be a ban on all tobacco advertisements, encompassing all potential viewpoints; it would be a restriction on content, not on viewpoint.

The guidelines at issue here bar religion as a subject in the same way. The Court in *Rosenberger* stated that it was not viewpoint-neutral for the University to include both religious and anti-religious speech, criticizing "an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech." 515 U.S. at 831–832. That was true for the facts in *Rosenberger*. But advertising is different from newspaper publications

and other kinds of speech; advertising *is* bipolar. Guideline 12, by prohibiting ads that promote or oppose religion, effectively prohibits religion as a subject within the forum.

Guideline 12 is not likely to be abused for viewpoint suppression. The First Amendment exists to protect individuals from laws that would suppress unpopular or anti-establishment speech. The Court has previously struck down rules in non-public forums that were "indeterminate prohibition[s]" which received "virtually open-ended interpretation. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1891 (2018). In *Minnesota Voters Alliance v. Mansky*, the Court took issue with the subjective prohibition against voters wearing any apparel "promoting a group with recognizable political views," any "political badge, political button, or other political insignia," or any "issue-oriented material designed to influence or impact voting." *Id.* at 1882. The state interpreted the prohibition to mean "only words and symbols that an objectively reasonably observer would perceive as conveying a message about the electoral choices at issue in the polling place." *Id.* at 1888–1889.

WMATA's guidelines do not face the same First Amendment concerns that were present in *Mansky*. The state rules restricted individual speech, and the rules were applied by poll workers. The poll workers could all interpret the rules differently, and voters would have no way to determine in advance whether their apparel was acceptable. In many cases, voters who violated the rules would have had to return home to change clothing, and they might have lost their only opportunity to vote—the most fundamental political right. Meanwhile, WMATA's advertising guidelines are applied to group speech by a single board of advisors, composed of two attorneys and the assistant manager of WMATA's marketing office. JA 200. Applicants are seeking advertising space, not access to the polls, and they can revise their ads and reapply if the

proposal is rejected. The consequences of and potential for any abuse of discretion are significantly smaller than in *Mansky*.

Further, WMATA's guidelines are easier to apply than the rules in *Manksy*, both because of the medium of communication being regulated and because religion is a more definite concept than "electoral choices." In *Mansky*, the state regulated speech—words and symbols—on clothing. When used as a medium of personal expression, clothing can communicate multiple messages at once or none at all, and sometimes the messages are indirect or obscure. Advertising, however, is intended to convey one, straightforward message; ads have the viewer's attention for only a moment, so they cannot be complicated. Ideally, an advertisement leaves a clear impression after just a few seconds. If the viewer can figure out the ad in that time, a review board would also be able to understand it.

There is also a difference between *Mansky's* "electoral choices" standard and WMATA's ban on ads that promote or oppose "religion, religious practices, or religious beliefs." The standard in *Mansky* was ill-defined, prohibiting more than just campaign materials but not quite all political speech. 138 S. Ct. at 1889. A "Support Our Troops" shirt could be banned if a candidate's platform included military funding or aid for veterans. *Id.* at 1890. The Court noted that, at oral argument, the state suggested that apparel citing the Second Amendment would be political, but apparel citing the First Amendment would not. *Id*. WMATA is not attempting to find some impossible middle ground; guideline 12 simply prohibits all advertisements about religion. Religions have established, recognizable symbols, texts, practices, terminologies, and beliefs. Religion, as opposed to 'electoral choices,' is not dependent on current events or social movements. The concept of religion is stable, making it easier to identify speech as religious or non-religious.

Some ads will be difficult to categorize as religious or non-religious. But every standard will have some ambiguity if enough lawyers get the chance to read it. The Supreme Court has stated, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Mansky,* 138 S. Ct. at 1891. "No vehicles in the park" is not unconstitutionally vague just because the city officials might not know whether a golf cart is a vehicle. Guideline 12 is simple enough to interpret and apply that it is unlikely to be abused.

Applicant Details

First Name	**Ahmed**
Last Name	**Farooq**
Citizenship Status	**Lawful permanent residents who are seeking citizenship as outlined in 8 U.S.C. Â§ 1324b(a)(3)(B)**
Email Address	**afarooq@llm19.law.harvard.edu**
Address	**Address** Street **125 Trading Bay** City **Kenai** State/Territory **Alaska** Zip **99611** Country **United States**
Contact Phone Number	**5718886150**

Applicant Education

BA/BS From	**Other**
JD/LLB From	**Other** **http://www.lawschool.edu**
Date of JD/LLB	**August 1, 2017**
LLM From	**Harvard Law School**
Date of LLM	**May 31, 2019**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Cambridge International Law Journal** **Harvard Human Rights Journal;** **Harvard International Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry Dunant Moot Court** **Phillip C. Jessup Moot Court**

United States Education Foundation Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Kennedy, Jocelyn
jokennedy@law.harvard.edu
617-496-2108

Anwar, Oves
ovesanwar@rsilpak.org
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Cratsley, John
jcratsley@law.harvard.edu

References

Judge John C. Cratsley (Ret.), Harvard Law School,
jcratsley@law.harvard.edu, (617) 496-6228

Professor Jocelyn Kennedy, Harvard Law School,
jokennedy@law.harvard.edu, (617) 496-2108

Oves Anwar, Research Society of International Law,
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

AHMED FAROOQ

Wolfson College, Barton Rd, Cambridge CB3 9BB, UK • + 447709263049 • afarooq@llm19.law.harvard.edu

June 15, 2021

The Honorable Elizabeth W. Hanes
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship at your chambers for the 2022 term. In the spring of 2019, I worked at the Massachusetts Supreme Judicial Court for Justice Lenk and Gaziano and went on to receive one of the most rewarding experiences of my professional life. There, I realized that I was truly passionate about upholding the rule of law by contributing directly to the judicial administration of justice. It is to continue to do so that I wish to clerk for you. The opportunity to support your work would be a privilege.

Attached to this application are my resume, law school transcripts, and writing sample. Also enclosed are letters from the following recommenders:

- Judge John C. Cratsley (Ret.), Harvard Law School, jcratsley@law.harvard.edu, (617) 496-6228
- Professor Jocelyn Kennedy, Harvard Law School, jokennedy@law.harvard.edu, (617) 496-2108
- Oves Anwar, Research Society of International Law, ovesanwar@rsilpak.org, +92 334 5755503

I would be coming to your chambers with the benefit of multiple undertakings that have honed my skills in legal research and writing. Prior to my LL.M. at Harvard, as an associate at an international law think-tank, I researched, wrote, and edited legal and policy reports. During my LL.M. year, I served as an editor for the *Harvard Human Rights Journal*, and I was the only student in my cohort to enroll in a course on Advanced Legal Research—a seminar that allowed me to build proficiency in researching law comprehensively and efficiently. Currently, at the University of Cambridge, I am actively engaged in legal research and writing for the Inter-American Court of Human Rights on an upcoming case. I also serve as an editor of as well as write for the *Cambridge International Law Journal*.

Finally, from 2021 to 2022, I will be clerking for the Kenai Superior Court—a placement I pursued as a means of developing a greater understanding of the workings of the law in the context of a smaller community. At the conclusion of the clerkship, I intend to return to Virginia—where I resided prior to leaving for the United Kingdom for my graduate studies—to continue working for the public interest.

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely yours,

Ahmed Farooq

AHMED FAROOQ

Wolfson College, Barton Rd, Cambridge CB3 9BB, UK • + 447709263049 • afarooq@llm19.law.harvard.edu

EDUCATION

UNIVERSITY OF CAMBRIDGE, Cambridge, United Kingdom
LL.M. (International Law) Candidate, June 2021
Honors: CULS Pro Bono Award
Activities: *Cambridge International Law Journal*, Editor
Cambridge Pro-Bono Project, IACtHR Researcher

HARVARD LAW SCHOOL, Massachusetts, United States
LL.M., May 2019
Clinical Paper: *Assessing the Validity of Pre-Service Removal*
Honors: Harvard Law School Summer Academic Fellowship
Activities: *Harvard Human Rights Journal*, Editor
Advanced Legal Research Training
Harvard Advocates for Human Rights, Middle-East Researcher

UNIVERSITY OF LONDON, London, United Kingdom
LL.B. (Hons.), First-Class Honors, August 2017
Honors: Award for Academic Achievement, 2015, 2016, and 2017 (ranked in 1%)
Activities: Law Society, President
Teacher's Assistant, Common Law Reasoning and Institutions

UNIVERSITY OF LONDON, London, United Kingdom
Diploma in Law, Merit, August 2015
Honors: Award for Academic Achievement (ranked 1 out of 18,000 candidates)
Award for Academic Achievement in Contract Law and Common Law (top in jurisdiction)

EXPERIENCE

HON. LANCE JOANIS, KENAI SUPERIOR COURT, Kenai, Alaska
Law Clerk Fall 2021–Fall 2022
Draft legal memoranda, conduct legal research, and assist in the administration of court proceedings.

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.
Visiting Researcher Fall 2019–Spring 2020
Researched and wrote academic papers and articles on human rights, politics, economics, and legal history.

HARVARD LAW SCHOOL, Cambridge, Massachusetts
Summer Academic Fellow Summer 2019
Researched and wrote the initial draft of an academic paper on international criminal law in the context of South-Asia under the supervision of Dean Martha Minow.

SUPREME JUDICIAL COURT, Cambridge, Massachusetts
Intern to Justice Barbara Lenk and Justice Frank Gaziano Spring 2019
Drafted memoranda for further appellate review of civil and criminal cases. Prepared recitation memoranda on property law. Wrote and presented case facts. Researched criminal and civil case law.

RESEARCH SOCIETY OF INTERNATIONAL LAW, Islamabad, Pakistan
Associate Fall 2017–Summer 2018
Coordinated research on extra-judicial killings, drone attacks, and death penalty cases with national and multi-national organizations. Managed the in-house law journal. Prepared legal reports for publication.

PUBLICATIONS

Ahmed Farooq, *Kashmir Dispute Redux: What of the Right of Self-Determination?* FORDHAM INTERNATIONAL LAW JOURNAL (2019).

Ahmed Farooq*, An Analysis of the Acceptable Standards for Living Conditions, Solitary Confinement and Unlawful Detention*, VOL. II, RSIL L. REV., ISSUE I, 120, 120-126 (2018).

LANGUAGES

English (fluent), Urdu (native), and Hindi (speaking).

INTERESTS

Competitive swimming (formerly on national team and Harvard Club Swim), calisthenics, and fishing.

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Ref: EISA/LLB/Dip-Standard/PJM/SvdP

2 November 2017

OFFICIAL AWARD TRANSCRIPT

TO WHOM IT MAY CONCERN

This is to certify that **Ahmed FAROOQ**

registered with the University of London for the **Diploma in Law** under the Revised Regulations in November 2014. For this award, students are registered with the University of London for a programme of study under the academic direction of the University of London Law Schools.

He passed the **Diploma** examination in 2015 with the following subjects and marks:

Criminal Law	66
Public Law	62
Common Law Reasoning and Institutions	74
Elements of the Law of Contract	72

Ahmed Farooq was awarded the **Diploma in Law** with Merit on 1 August 2015.

His registration was transferred to the **Standard Entry Route** and he was credited with four subjects.

He passed the examination in the following subjects in 2016 with the marks indicated:

Tort Law	70
Property Law	72
EU Law	66
Introduction to Islamic Law	70

He completed the examination for the award of the degree by passing in the following subjects in 2017 with the marks indicated:

Equity and Trusts	63
International Protection of Human Rights	60
Jurisprudence and Legal Theory	68
Conflict of Laws	70

Ahmed FAROOQ was awarded the degree of **Bachelor of Laws** with First Class Honours on 1 August 2017.

This degree is equivalent to **180 E.C.T.S credits**, with each unit being equivalent to **15 credits**.

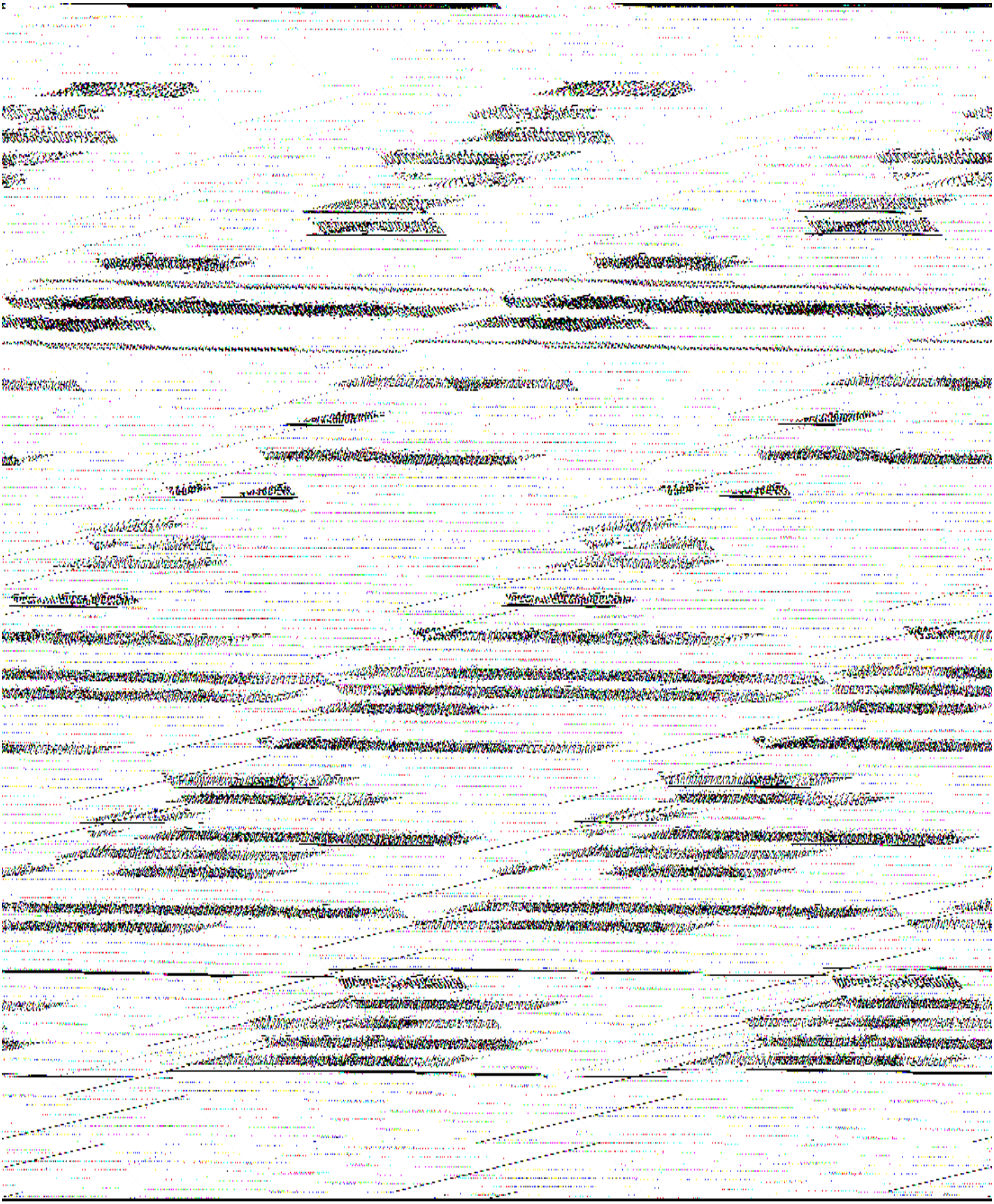
Craig O'Callaghan
Chief Operating Officer

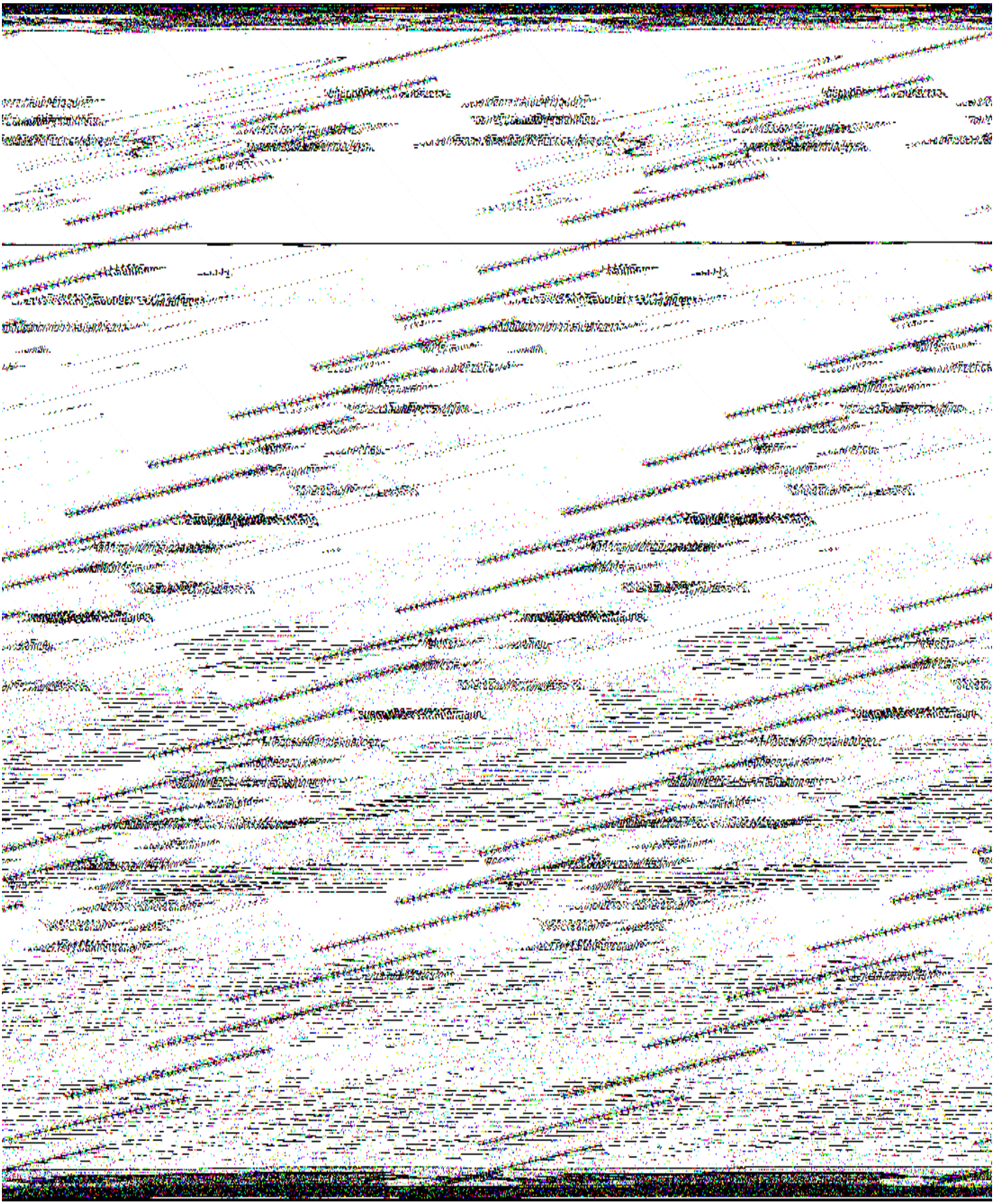
This Award Transcript is a record of learning and achievement that reflects the requirements of the award of this qualification.

This document is not official unless it contains the signature of the Chief Operating Officer and his embossed seal.

The University of London certifies that this award is a Qualifying Law Degree and meets the requirements of the academic stage of training to be a lawyer in England and Wales.

A qualifying law degree is one where the seven foundation of legal knowledge subjects have been successfully passed with a mark of at least 40% in no more than three attempts, and the degree has been completed within six years. The Foundations of Legal Knowledge subjects are Criminal Law, Public Law, Elements of the Law of Contract, Law of Tort, Law of Trusts, Property Law and EU Law.





UNOFFICIAL TRANSCRIPT

INFORMATION IDENTIFYING THE HOLDER OF THE QUALIFICATION

Surname	Farooq
Forenames	Ahmed

DEGREES AWARDED

No degree awarded.

INFORMATION IDENTIFYING THE QUALIFICATION(S)

Name and status of awarding institution	University of Cambridge
College	Wolfson College
Name of Qualification	Master of Law
Level of Qualification	Postgraduate (Full-Time)
Field(s) of study for the qualification	Master of Law
Official length of Course	One Year
Course Start Date	Michaelmas Term 2020 (01 October 2020)
Language of Instruction and Examination	English

ACADEMIC RECORD

(*) denotes no marks recorded for this unit

No Recorded Results for this Course

FURTHER INFORMATION

For further information please refer to the programme specification at
http://www.admin.cam.ac.uk/univ/camdata/archive.html
Where available, this will contain information on:

- Access Requirements
- Programme Requirements
- Professional Status
- Grading Schemes and Degree Classification
- Access to further study

INFORMATION ON THE NATIONAL HIGHER EDUCATION SYSTEM

Programme specifications as found on: http://www.admin.cam.ac.uk/univ/camdata/archive.html, for all courses, include an indication of the level of the course in the context of the Framework for Higher Education Qualification in England, Wales and Northern Ireland, published by the Quality Assurance Agency (QAA). Full descriptors of the levels of the Framework can be viewed on the QAA website:
http://www.qaa.ac.uk/quality-code

UNOFFICIAL TRANSCRIPT

LIST OF UNIVERSITY OF CAMBRIDGE MASTER OF LAWS (INTERNATIONAL LAW CONCENTRATION) COURSES

I. INTERNATIONAL ENVIRONMENTAL LAW
   - *PROFESSOR JORGE VINUALES*

II. INTERNATIONAL LAW OF GLOBAL GOVERNANCE
   - *PROFESSOR EYAL BENVENISTI*

III. LAW OF ARMED CONFLICT, USE OF FORCE AND PEACEKEEPING
   - *DR. FERNANDO LUSA BORDIN*

IV. INTERNATIONAL HUMAN RIGHTS LAW
   - *DR. SANDESH SIVAKUMARAN*

June 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in support of Ahmed Farooq's application to serve as a clerk in your chamber. Ahmed was a student in my Advanced Legal Research (ALR) course at Harvard Law School during the spring of 2019. Students in (ALR) are required to engage in extensive research through the se-mester and submit a final written memo to demonstrate their mastery of legal research and ability to synthesize that research into a predictive memo. During the course, students learn to develop a research strategy; to understand the interrelationship of cases, statutes and regula-tions; and to evaluate the best sources to find an answer to the question at hand. With his back-ground in law from his prior studies and his practical experience, Ahmed developed, over the course of the semester, deep research skills which will serve him well as a law clerk. His written work product throughout the semester was thoughtful, well grounded, and well written.

Ahmed's experiences interning with the Massachusetts's Supreme Judicial Court during his spring semester at Harvard Law School, as well as his experience as a research associate for the Research Institute of International Law served Ahmed well during our ALR course. Ahmed had the practical experience to fully embrace research and writing as a systematic and iterative pro-cess. A strong researcher will leverage all of the tools available to him to conduct his research. Ahmed exemplified this principle during the semester. He was thoughtful in developing an ap-proach to each research problem while remaining flexible to adapt his research as he made new discoveries.

Throughout the semester Ahmed sought opportunities to stretch his skills, using all of the avail-able research platforms at his disposal. Although this is highly encouraged during the semester, most students default to the familiar. Ahmed clearly understood that an exceptional research cannot rely solely on one platform or source of information and he worked hard to build capacity in all fee-based research platforms, as well as government websites and print based material. His contributions in class were informed by his simultaneous experience as a law clerk. During the course, he was able to provide his classmates with a unique perspective, both from his educa-tional experience and his real-world experience. Ahmed is a learner by nature, evident by his high level of curiosity and eagerness to hone his research skills. He came to class prepared not only to learn but to engage deeply with the class. I could count on him to be an active participant, asking questions that furthered learning not only for himself but for the entire class.

Ahmed was clear during the semester that he wanted to pursue clerkship opportunities as a way to further support his familiarity and understanding of U.S. law and the legal system. As a teach-er, lecturer and researcher, his work has focused on the public good. He expressed that a clerk-ship would enable him to continue to contribute more broadly for the public benefit.

Ahmed is personable, engaging and insightful. We had the opportunity to talk at length about the value of clerking, particularly at the state level, to develop a deep understanding of the local bar and the workings of the state courts and legal systems. Ahmed seeks a clerkship to utilize his re-search and writing skills, which are exemplary. Ahmed has the necessary technical and personal skills to be a valuable contributor. It is without hesitation that I recommend him for a position in your chamber.

Sincerely,

Jocelyn Kennedy, Lecturer on Law
Executive Director, Harvard Law School Library

Jocelyn Kennedy - jokennedy@law.harvard.edu - 617-496-2108

RESEARCH SOCIETY OF INTERNATIONAL LAW
Oves Anwar, LL.B. (London), LL.M. (SOAS), LL.M. (Vienna), Diploma (Montpellier)
Director of Research

July 31, 2020

Recommendation Letter for Mr. Ahmed Farooq

It is indeed with great pleasure that I write this recommendation for Mr. Ahmed Farooq for the purpose of his clerkship application. I know Mr. Farooq in a professional capacity—he formerly worked at the Research Society of International Law (RSIL) as an Associate from 2017 to 2018. During this period, as Director of Research at RSIL, I was responsible for the direct supervision of his work. Mr. Farooq is one of the most intelligent, hardworking, and driven individuals that I have had the privilege of supervising. I wholeheartedly give him my strongest recommendation for a judicial clerkship.

As a Research Associate, Mr. Farooq was a valuable asset. He deftly dealt with multiple time-sensitive projects, adapted quickly to heavy workloads, and functioned as an integral team player. He produced outstanding research and extremely well-drafted policy briefs on diverse matters of both domestic and international law. His work has contributed to provincial prosecutorial reform in Pakistan. Much of his writing has informed RSIL's publications. Additionally, at least one domestic judicial decision has cited his work.

Intellectually, Mr. Farooq is rather exceptional. He possesses a unique ability to efficiently synthesize information, relay it in simple terms, and reduce it to writing comprehensively. It was for this reason that he was permitted to conduct independent research projects and speak on complex legal topics at conferences at a very early stage in his career at RSIL. Mr. Farooq's academic prowess is paired with remarkable dedication: he often worked late hours and weekends, many a time on his own accord.

While he was at RSIL, Mr. Farooq's discipline was evident every day—he arrived to work on time and always met office deadlines. His conviction to improve was clear as well. He regularly sat in on office meetings simply to observe and learn. Moreover, he exemplified confidence: he persuasively expressed his thoughts on legal subjects in multiple national seminars and conferences, most of which were attended by revered professionals from legal and diplomatic spheres, without any hesitation.

Overall, Mr. Farooq is an extremely talented lawyer and academic, a constant learner, and an individual who welcomes challenges. But above all, he is a kind-hearted and compassionate human, one who believes in the promise of the law and who embodies the concept of commitment to the public interest. I give him my strongest recommendation for a placement at your chambers.

Please feel free to contact me if I may be of any further assistance.

Sincerely,

Muhammad Oves Anwar,
Director, Research,
Research Society of International Law
House # 2-A, Main Embassy Road, Ata Turk Avenue, G-6/4, Islamabad 44000, Pakistan
Tel: 051 2831033, 8739300
Fax: 051 2831156, 8739400
Email: ovesanwar@rsilpak.org

June 15, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to write this combined academic and professional recommendation for Ahmed Farooq, who received his LLM degree from Harvard Law School on May 30, 2019. We first met during the Winter Term 2018-19 and then in the Spring Semester 2019, he participated in an Independent Clinical Placement under my supervision with Justices Barbara Lenk and Frank Graziano of the Massachusetts Supreme Judicial Court. As part of that internship he wrote an excellent paper for me on a little known and little understood, but increasingly utilized, preemptive step in civil procedure called pre-service removal. His paper titled, “Addressing the Validity of Pre-Service Removal” provided a full review of how the several federal circuits have addressed this practice. His conclusion, favoring legislation over waiting for the US Supreme Court to resolve the competing issues arising from the circuit courts, was persuasive.

What was impressive about Ahmed’s work for the two justices were the comments of his direct supervisor. She wrote me the following at the end of the semester; “Ahmed was extremely dedicated and hardworking during his internship and worked extra hours at his own request to finish projects.” She continued, “Ahmed also is an extremely nice person and was well liked by all;” I can easily confirm his dedication to his internship assignments when I look back at his weekly reflections required by the Independent Clinical at Harvard Law School. Each week he sent me a timely review of the legal research assigned to him as well as his general evaluation of the challenges presented (without, of course, breaching any requirements of confidentiality). No student doing an Independent Clinical judicial placement with me has been so thorough in reporting their accomplishments week by week.

As a result of both my direct work with Ahmed and the positive evaluation of his immediate supervisor at the Massachusetts Supreme Judicial Court, I am comfortable recommending him for further academic study, an appellate clerkship, or the practice of law.

Sincerely,

Honorable John Cratsley (Retired, MA Superior Court)
Director of the Judicial Process in Trial Courts Clinic and Class
Lecturer on Law, Harvard Law School
Adjunct Faculty, Boston College Law School

John Cratsley - jcratsley@law.harvard.edu

AHMED FAROOQ

Wolfson College, Barton Rd, Cambridge CB3 9BB, UK • + 447709263049 • afarooq@llm19.law.harvard.edu

WRITING SAMPLE

Drafted Summer 2020

The following writing sample is a memorandum analyzing the validity of pre-service removal—a litigation tactic through which a case may be moved from state court to federal court by a named, yet to be served, forum defendant—in Pennsylvania. The writing sample has received no outside editing. The facts of the writing sample are largely hypothetical and were developed through after-class discussions with Professor Joseph Glannon, a visiting faculty member at Harvard Law School and a Professor of Law at Suffolk University.

JUDICIAL MEMORANDUM

To: Judges of the Ames District Court
From: Ahmed Farooq
Date: March 4, 2021
Re: Pre-Service Removal in Pennsylvania

Facts

A Virginia plaintiff filed a lawsuit against defendants from Massachusetts and Pennsylvania. The damages sought were $500,000. The plaintiff chose a state court in Pennsylvania as the forum for the case. Unbeknownst to the plaintiff, the defendant from Pennsylvania was monitoring his state's court docket and learnt of the impending lawsuit before he was officially served. Now, the Pennsylvania defendant, wishing to contest the case under federal procedural rules, has taken the necessary steps to have the case removed from state court to a federal district court.

Questions Presented

I. Does there exist a legal framework under which an in-state defendant may rightfully remove a case from a state court to a federal court prior to being served?

II. Under federal law, can a defendant from Pennsylvania, prior to being officially served with a lawsuit, successfully remove a case from state court to federal district court when the amount in controversy in the case exceeds $75,000 and the plaintiff and defendant are citizens of different states?

Brief Answers

I. Yes. The method through which this may be undertaken though is qualified. When diversity jurisdiction exists, out-of-state defendants are entitled to remove cases from state to federal court in order to avoid prejudice from the local community. In-state defendants are precluded from doing so because they do not stand to face any prejudice from their own home

community. This is referred to as the forum-defendant rule and it only applies when the in-state defendant has been properly joined and served. When proper joinder has not occurred, the rule does not apply, and an in-state defendant may remove a case from his local state court to federal court—a process known as pre-service removal.

II. Almost certainly, yes. Under the present facts, diversity of jurisdiction exists, the case has been lodged in a state court in Pennsylvania and the in-state defendant has chosen to file for removal prior to officially being served. The forum-defendant rule would ordinarily have barred the Pennsylvania defendant from removing the case to federal court, but it will not apply here because the Pennsylvania defendant was not properly joined and served. Therefore, theoretically, the Pennsylvania defendant can file for pre-service removal. The salient question then is whether a Pennsylvania court would recognize the validity of a removal of such a nature. Federal courts across the United States have for over a decade struggled with accepting the legitimacy of pre-service removal procedures. However, the Court of Appeals for the Third Circuit, in 2018, recognized the validity of pre-service removals by interpreting the forum-defendant rule under its plain meaning. A Pennsylvania district court would consequently be bound by the precedent and reasoning of the Third Circuit's decision and would ultimately uphold the Pennsylvania defendant's pre-service removal motion.

Discussion

The procedural maneuver through which a named forum defendant may remove a civil case from his local state court to a federal court prior to formally being served is known as pre-service removal. The validity of pre-service removals constitutes an area of law that is the subject of fierce debate among scholars and contradictory judicial decisions across federal courts. Arguments on the permissibility of this litigation tactic commonly center on textualist interpretations of 28 U.S.C. § 1441(b)(2), analyses of congressional intent, and general policy contentions—to make a probabilistic prediction of whether a federal court in the state of

Pennsylvania would permit pre-service removal, it is necessary to exposit each of the foregoing considerations. Therefore, the discussion that follows will (1) detail the legal framework of pre-service and (2) with reference to policy arguments and case law, ultimately assess how a federal court in the state of Pennsylvania would rule on the matter.

I. The Legal Framework of Pre-Service Removals

The doctrine of pre-service removals is situated within the overarching law of removals. Removals are governed by 28 U.S.C. § 1441: generally, … "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court." See 28 U.S.C. § 1441 (2018). This denotes that if an action could have originally been filed in federal court, it can also be removed from a state court to a federal court. See Matthew Curry, Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule, 58 Clev. St. L. Rev. 907, 909 (2010).

One of the ways in which a case can be removed from state court to federal court under 28 U.S.C. § 1441 is on the basis of diversity jurisdiction. See 16 Moore's Federal Practice - Civil § 107.50 (2019). A finding of diversity jurisdiction may be made under the existence of two cumulative circumstances: first, the amount in controversy must exceed the value or sum of $75,000, and second, the lawsuit in question must be between citizens of different states. See 28 U.S.C. § 1332(a)(1) (2018). Therefore, when diversity jurisdiction exists and a plaintiff opts to file a case in state court instead of federal court, it is the defendant's prerogative to remove that case to a federal district court if he wishes to do so.

Removal on the basis of diversity jurisdiction, however, does not exist without qualification. 28 U.S.C. § 1441(b)(2) promulgates a prohibition to permitting removal in cases of diversity jurisdiction: "A civil action otherwise removable solely on the basis of . . .

[diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." See 28 U.S.C. § 1441(b)(2) (2018). Therefore, properly joined and served defendants are prohibited from removing a case from state to federal court on the basis of diversity jurisdiction if they are, themselves, citizens of the forum state. See id. This is known as the forum-defendant rule, and it applies not only to removal actions initiated by the forum defendant, but to removal actions by any defendant.

The purpose of the forum-defendant rule is concomitant with that of diversity jurisdiction and is instrumental in understanding pre-service removal. Diversity jurisdiction exists to provide out of state litigants with an unbiased forum, and thereby protects them against local prejudices. See 16 Moore's Federal Practice - Civil § 107.55 (2018). Against the presumption that an in-state defendant would not suffer from any such prejudice, the forum-defendant rule logically precludes removal when the defendant is from the forum state itself. This proposition stands in relation to out-of-state defendants as well, provided that the in-state defendant has been properly joined and served. In such circumstances, out-of-state defendants are thought to be privy to a home-court advantage by proximity to the in-state defendant; this, coupled with the fact that the plaintiff is not from the forum state as well is thought to be sufficient to remove any risk of the out-of-state defendant facing local biases.

The text of 28 U.S.C. § 1441(b)(2) itself gives rise to the concept of pre-service removal. Specifically, it is the phrase – *properly joined and served* – that constitutes the basis for arguments seeking to legitimize pre-service removal practices. Essentially, assume a forum defendant were to somehow preempt formal notice of a lawsuit—either by electronically monitoring state court dockets or by recognizing that a plaintiff was serving non-forum defendants and that it was only a matter of time before he would be served—and apply to have a prospective case removed from state to federal court before he could be *properly joined and*

served. In such circumstances, the forum defendant rule will not apply because the forum defendant was never properly joined and served, and therefore, on a plain reading of 28 U.S.C. § 1441(b)(2), removal from state to federal court would be permitted. This would amount to pre-service removal.

Thus, there certainly exists a legal framework for the exercise of pre-service removals: when diversity jurisdiction exists and a plaintiff chooses to file a case in the defendant's state court, and the defendant moves to have the case removed to federal court before he has been properly joined and served, pre-service removal may be permitted.

II. The Ruling of a Federal District Court in Pennsylvania

The stipulated facts are a paradigmatic illustration of the practice of pre-service removal. The plaintiff and the defendant belong to different states, and therefore, diversity jurisdiction exists. Ordinarily, the Pennsylvania defendant would be able to remove the case from state court to federal district court, but on the present facts, the plaintiff filed his case in the defendant's home state. The forum-defendant rule would preclude removal in such circumstances. However, it seems that the Pennsylvania defendant was never properly joined and served, so the forum-defendant rule is inapplicable—the Pennsylvania defendant can move for pre-service removal. And as established in the foregoing section, on a particular interpretation of the forum defendant rule, the law does seem to permit the practice of pre-service removal. However, not all courts subscribe to such interpretations and the question of the Pennsylvania defendant succeeding in his action rests on whether federal courts in his home state consider pre-service removal a legitimate litigation maneuver. This section will therefore evaluate the arguments that have both buttressed and negated pre-service removals and then analyze which of these arguments have been found to be convincing by courts in the state of

Pennsylvania. Against this backdrop, a prediction of how a district court in Pennsylvania would rule on the stipulated facts will be made.

One of the most commanding arguments in support of pre-service removal lies under the plain language rule—a general principle of statutory interpretation. The plain language rule posits that when an authoritative written text of the law has been adopted, the particular language of that text is always the starting point on any question concerning the application of the law. See 2A Norman Singer, Sutherland Statutory Construction § 45:1 (7th ed. 2009). The text of the forum-defendant rule, under its plain meaning, permits removal in diverse cases when an in-state defendant has not properly been joined and served. Consequently, pre-service removal seems to be permissible within the strictures of the forum-defendant rule.

In contrast, critics of pre-service removal commonly equilibrate on the contention that permitting this litigation tactic would be to misconstrue congressional intent. The purpose of the *joined and served* language of the forum-defendant rule is understood to be to prevent gamesmanship by plaintiffs who might otherwise name an in-state defendant against whom there is no valid claim merely to prevent removal by the other defendants. See 16 Moore's Federal Practice - Civil § 107.50 (2019). However, if defendants were allowed to swiftly remove newly filed state court cases before the plaintiff has had a chance to serve the forum defendant, congressional intent to prevent litigant gamesmanship would be turned on its head. See DeAngelo-Shuayto v. Organon USA, Inc., WL 4365311 8-15 (D.N.J. 2007). To interpret the forum-defendant rule under its plain meaning would be to produce a result clearly at odds with congressional intent.

A district court in Pennsylvania would, in all likelihood, uphold a motion for pre-service removal, largely on the basis of precedent—in 2018, the United States Court of Appeals for the Third Circuit, in the face of a decade of contradictory district court decisions, recognized

the validity of pre-service removal with finality by allowing a forum defendant to move a case from state court to federal court prior to being served. See Encompass Insurance Co. v. Stone Mansion Restaurant, Inc., 902 F.3d 147 (3d Cir. 2018). In Encompass, the counsel for the forum defendant initially agreed, as evidenced from email correspondence, to accept electronic service of process rather than formal service. See id. at 150. However, defence counsel, prior to acceptance of electronic service, removed the case from state court to federal court. See id. Encompass subsequently filed a motion to remand the matter to the state trial court on the grounds that removal was improper pursuant to the forum defendant rule. See id. The district court denied the motion. See id. The district court concluded that the forum defendant rule did not apply because it precluded removal only if any of the parties in interest properly joined and served as defendants were a citizen of the state in which the action was brought—Stone Mansion was such a citizen but had not been properly joined and served since their defence counsel had not accepted service of Encompass' complaint until after the filing of a notice of removal. See id.

The Court of Appeals for the Third Circuit upheld the decision of the district court on two core strands of reasoning. First, the Court alluded to the plain language of the forum-defendant rule and concluded that § 1441(b)(2) unambiguously precludes removal on the basis of in-state citizenship only when the forum defendant has been properly joined and served. See Encompass, 902 F.3d at 151. Second, the Court determined that the congressional intent undergirding the forum-defendant rule was to prevent a plaintiff from blocking removal actions by joining as a defendant a resident party against whom they have no intention of proceeding and whom they may not even serve. See id. Given that there was no question of fraudulent joinder in Encompass, the Court held that permitting pre-service removal did not contravene congressional intent. Thus, the Court accepted the validity of pre-service removal.

A Pennsylvania district court, against the decision in Encompass, would likely uphold the pre-service removal motion by the Pennsylvania defendant. On the current facts, there is no evidence to support the contention that the plaintiff named the Pennsylvania defendant fraudulently, and thus, there does not exist a policy-based reason to preclude pre-service removal. And because the Pennsylvania defendant had never been properly joined and served, the district court would conclude, under the plain language rule, that the forum-defendant rule does not apply. Consequently, the court would, in all probability, uphold the Pennsylvania defendant's motion for pre-service removal.

Conclusion

When diversity jurisdiction exists and a plaintiff files a case in a state court other than that of the defendant's home, the defendant can file for removal to federal court to avoid local biases. When the plaintiff files such a case in the defendant's home state court, however, the defendant cannot remove it to federal court because he is presumed to be at no risk of prejudice from his home community—this is known as the forum-defendant rule and it applies only when the defendant has been properly served. Were a named forum defendant to become cognizant of an impending suit against him in his local state court prior to service, he may motion for the case to be removed to federal court through a process known as pre-service removal.

On the stipulated facts of the present case, a district court in Pennsylvania will, in all likelihood, uphold the Pennsylvania defendant's motion for pre-service removal. The district court would base its decision on a recent Third Circuit ruling that established that the forum-defendant rule is to be interpreted under its plain meaning. See Encompass, 902 F.3d. Under such an interpretation of the forum-defendant rule, the Pennsylvania defendant was never properly joined and served, and thus is lawfully permitted to remove the case to federal court.

Applicant Details

First Name	**Ahmed**
Last Name	**Farooq**
Citizenship Status	**Lawful permanent residents who are seeking citizenship as outlined in 8 U.S.C. Â§ 1324b(a)(3)(B)**
Email Address	**afarooq@llm19.law.harvard.edu**
Address	**Address** Street **125 Trading Bay** City **Kenai** State/Territory **Alaska** Zip **99611** Country **United States**
Contact Phone Number	**5718886150**

Applicant Education

BA/BS From	**Other**
JD/LLB From	**Other** **http://www.lawschool.edu**
Date of JD/LLB	**August 1, 2017**
LLM From	**Harvard Law School**
Date of LLM	**May 31, 2019**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Cambridge International Law Journal** **Harvard Human Rights Journal;** **Harvard International Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry Dunant Moot Court** **Phillip C. Jessup Moot Court**

United States Education Foundation Moot Court

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Anwar, Oves
ovesanwar@rsilpak.org
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617-496-2108
Cratsley, John
jcratsley@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

AHMED FAROOQ

12161 Abington Hall Pl # 204, Reston VA 20190 • + 1 (571) 888 6150 • afarooq@llm19.law.harvard.edu

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship at your chambers for August 2021. In the spring of 2019, I worked at the Massachusetts Supreme Judicial Court for Justice Lenk and Gaziano on matters of civil and criminal law and received one of the most rewarding experiences of my professional life. Through the exposure that the Supreme Judicial Court afforded me, I realized that I was truly passionate about contributing to the rule of law and the administration of justice. It is for this reason that I wish to clerk for you—the opportunity to support your undeniably important work would be an absolute privilege.

Attached to this application are my resume, list of references, law school transcripts, and writing samples. The following recommenders have submitted their letters separately:

- Judge John C. Cratsley (Ret.), Harvard Law School, jcratsley@law.harvard.edu, (617) 496-6228
- Professor Jocelyn Kennedy, Harvard Law School, jokennedy@law.harvard.edu, (617) 496-2108
- Oves Anwar, Research Society of International Law, ovesanwar@rsilpak.org, +92 334 5755503

I would be coming to your chambers with the benefit of multiple undertakings that have honed my skills in legal research and writing. Prior to my LL.M. at Harvard, as an associate at an international law think-tank, I researched, wrote, and edited legal and policy reports. During my LL.M. year, I served as an editor for the *Harvard Human Rights Journal* and I was the only student in my cohort to enroll in a course on Advanced Legal Research—a seminar that allowed me to build proficiency in conducting comprehensive and efficient research. I also simultaneously worked at the Massachusetts Supreme Judicial Court, drafting memoranda on civil law, criminal law, and further appellate review. Moreover, by the time the term of this clerkship commences, I will have completed a Master of Laws from the University of Cambridge.

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely yours,

Ahmed Farooq

AHMED FAROOQ

12161 Abington Hall Pl # 204, Reston VA 20190, United States • +1 (571) 888 6150 • afarooq@llm19.law.harvard.edu

EDUCATION

UNIVERSITY OF CAMBRIDGE, Cambridge, United Kingdom
LL.M., June 2021
Concentration: International Law and Global Governance

HARVARD LAW SCHOOL, Cambridge, Massachusetts
LL.M., May 2019
Clinical Paper: *Assessing the Validity of Pre-Service Removal*
Honors: Harvard Law School Summer Academic Fellowship
Activities: *Harvard Human Rights Journal*, Editor
Harvard Advocates for Human Rights, Project Member
Harvard Club Swim

UNIVERSITY OF LONDON, London, United Kingdom
LL.B. (Hons.), First-Class Honors, August 2017
Honors: Award for Academic Achievement, 2015, 2016, and 2017 (ranked in 1% worldwide)
Activities: Law Society, Founder and President
Teacher's Assistant, Common Law Reasoning and Institutions

UNIVERSITY OF LONDON, London, United Kingdom
Diploma in Law, Merit, August 2015
Honors: Award for Academic Achievement (ranked 1 out of 18,000 candidates worldwide)
Award for Academic Achievement in Contract Law and Common Law (top in jurisdiction)

EXPERIENCE

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.
Visiting Researcher Fall 2019–Spring 2020
Worked on refining and advancing the draft of an academic paper that normatively analyzed international crimes committed by warring parties during the Bangladesh Liberation War of 1971.

HARVARD LAW SCHOOL, Cambridge, Massachusetts
Summer Academic Fellow Summer 2019
Researched and prepared the initial draft of an academic paper on the conflicts during the Bangladesh Liberation War of 1971 under the supervision of Dean Martha Minow.

SUPREME JUDICIAL COURT, Cambridge, Massachusetts
Intern to Justice Barbara Lenk and Justice Frank Gaziano Spring 2019
Drafted memoranda for further appellate review of civil and criminal cases. Prepared a recitation memorandum on property law. Wrote and presented case facts. Researched criminal and civil case law.

RESEARCH SOCIETY OF INTERNATIONAL LAW, Islamabad, Pakistan
Junior Research Associate Fall 2017–Summer 2018
Collaborated with a research team on a variety of human rights, criminal law, and governmental policy projects. Managed the in-house law journal and internship program. Prepared legal reports for publication.

ISLAMABAD SCHOOL OF LAW, Islamabad, Pakistan
Lecturer of Tort Law, Property Law, and Jurisprudence Fall 2017–Summer 2018
Taught second-year law students Tort Law and Property Law, and third-year law students Jurisprudence.

PUBLICATIONS

Ahmed Farooq, *Kashmir Dispute Redux: What of the Right of Self-Determination?* FORDHAM INTERNATIONAL LAW JOURNAL (2019), https://www.fordhamilj.org/iljonline/2019/9/10/kashmir-dispute-redux-what-of-the-right-of-self-determination.

Ahmed Farooq and Haniya Hasan, *An Analysis of the Acceptable Standards for Living Conditions, Solitary Confinement and Unlawful Detention*, VOL. II, RSIL L. REV., ISSUE I, 120, 120-126 (2018).

LANGUAGES

English (fluent), Urdu (native), Hindi (speaking proficiency) and Arabic (reading proficiency).

INTERESTS

Competitive swimming, calisthenics, running outdoors, and occasional fishing.

AHMED FAROOQ

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REFERENCES

The Honorable John Cratsley (Ret.)
Lecturer on Law
Harvard Law School
1585 Massachusetts Avenue
Wasserstein Hall, Rm. 3137
Cambridge, MA 02138
(617) 497-6228
jcratsley@law.harvard.edu

Judge Cratsley was my clinical instructor during my time as an intern at the Massachusetts Supreme Judicial Court. I sent him weekly reports of my work at the Court and wrote under his supervision a paper on the litigation tactic known as "Pre-Service Removal".

Oves Anwar
Director of Research
The Research Society of International Law
Main Embassy Road, #2A, G-6/4
Islamabad, 44000
Pakistan
+92 334 5755503
ovesanwar@rsilpak.org

Mr. Anwar was my direct supervisor when I was employed as an Associate at the Research Society of International Law.

Professor Jocelyn Kennedy
Lecturer on Law
Harvard Law School
1585 Massachusetts Avenue,
Areeda Hall, Room 526
Cambridge, MA 02138
(617) 495-5069
jokennedy@law.harvard.edu

Professor Kennedy taught me a course on Advanced Legal Research during the 2019 Spring semester at Harvard Law School.

Ahmed Farooq
Other
Cumulative GPA: N/A. First-Class Honours

2014-2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Ali Sohail	66	15	
Public Law	Sami Qureshi	62	15	
Elements of the Law of Contract	Zarnab Aurakzai	72*	15	Distinction/Academic Achievement Award
Common Law Reasoning and Institutions	Sami Qureshi	74*	15	Distinction/Academic Achievement Award

The student was awarded a Diploma in Law and was recognized as having scored the highest aggregate marks worldwide. The student received an Academic Achievement Award for his aggregate result.

2015-2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property Law	Zoha Sohail	72	15	Distinction
Introduction to Islamic Law	Mehreen Ishaque	70	15	Distinction
Tort Law	Sami Qureshi	70	15	Distinction
EU Law	Qasim Qureshi	66	15	

The student received an Academic Achievement Award for his aggregate result.

2016-2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Equity and Trusts	Sami Qureshi	63	15	
Jurisprudence and Legal Theory	Sandra Noor	68	15	
Conflict of Laws	Mehreen Ishaque	70	15	Distinction
International Protection of Human Rights	Hijab Siddiqui	60	15	

The student was awarded First-Class Honours. The student received an Academic Achievement Award for his aggregate result.

Grading System Description

University of London law courses utilize a numerical marking scale. Marks, in turn, correspond to a grade classification, as follows:
1) 70 and over - Distinction
2) 60 to 69 - Merit
3) 50 to 59 - Credit
4) 40 to 49 - Pass
5) 0 to 39 - Fail
Students may be given Academic Achievement Awards in recognition of scoring the highest marks in their course. They may also be given the same award for scoring an exceptionally high aggregate score of all their courses in a year of study.

Ahmed Farooq
Harvard Law School

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law and Psychology: The Emotions	David Cope	H	2	
Conflict of Laws	Joseph Glannon	P	3	
An Introduction to American Law	Amy McManus	H	2	
Legal Profession	Timothy Dacey	P	3	

Fall 2018 - Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Research, Writing and Analysis II	Amy McManus	CR	2	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
The Nuremberg Trial	Alex Whiting	P	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Jocelyn Kennedy	H	2	
Independent Clinical - SJC of Massachusetts	John Cratsley	CR	3	
Constitutional Law: First Amendment	Martha Field	LP	4	
LLM Required Written Work	Alex Whiting	H	2	

Grading System Description
Most Harvard Law School courses use a grading scale of Honors, Pass, Low Pass, or Fail (“H, P, LP, or F”). Some courses are graded on a Credit or Fail (“CR or F”)

RESEARCH SOCIETY OF INTERNATIONAL LAW
Oves Anwar, LL.B. (London), LL.M. (SOAS), LL.M. (Vienna), Diploma (Montpellier)
Director of Research

July 31, 2020

Recommendation Letter for Mr. Ahmed Farooq

It is indeed with great pleasure that I write this recommendation for Mr. Ahmed Farooq for the purpose of his clerkship application. I know Mr. Farooq in a professional capacity—he formerly worked at the Research Society of International Law (RSIL) as an Associate from 2017 to 2018. During this period, as Director of Research at RSIL, I was responsible for the direct supervision of his work. Mr. Farooq is one of the most intelligent, hardworking, and driven individuals that I have had the privilege of supervising. I wholeheartedly give him my strongest recommendation for a judicial clerkship.

As a Research Associate, Mr. Farooq was a valuable asset. He deftly dealt with multiple time-sensitive projects, adapted quickly to heavy workloads, and functioned as an integral team player. He produced outstanding research and extremely well-drafted policy briefs on diverse matters of both domestic and international law. His work has contributed to provincial prosecutorial reform in Pakistan. Much of his writing has informed RSIL's publications. Additionally, at least one domestic judicial decision has cited his work.

Intellectually, Mr. Farooq is rather exceptional. He possesses a unique ability to efficiently synthesize information, relay it in simple terms, and reduce it to writing comprehensively. It was for this reason that he was permitted to conduct independent research projects and speak on complex legal topics at conferences at a very early stage in his career at RSIL. Mr. Farooq's academic prowess is paired with remarkable dedication: he often worked late hours and weekends, many a time on his own accord.

While he was at RSIL, Mr. Farooq's discipline was evident every day—he arrived to work on time and always met office deadlines. His conviction to improve was clear as well. He regularly sat in on office meetings simply to observe and learn. Moreover, he exemplified confidence: he persuasively expressed his thoughts on legal subjects in multiple national seminars and conferences, most of which were attended by revered professionals from legal and diplomatic spheres, without any hesitation.

Overall, Mr. Farooq is an extremely talented lawyer and academic, a constant learner, and an individual who welcomes challenges. But above all, he is a kind-hearted and compassionate human, one who believes in the promise of the law and who embodies the concept of commitment to the public interest. I give him my strongest recommendation for a placement at your chambers.

Please feel free to contact me if I may be of any further assistance.

Sincerely,

Muhammad Oves Anwar,
Director, Research,
Research Society of International Law
House # 2-A, Main Embassy Road, Ata Turk Avenue, G-6/4, Islamabad 44000, Pakistan
Tel: 051 2831033, 8739300
Fax: 051 2831156, 8739400
Email: ovesanwar@rsilpak.org

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in support of Ahmed Farooq's application to serve as a clerk in your chamber. Ahmed was a student in my Advanced Legal Research (ALR) course at Harvard Law School during the spring of 2019. Students in (ALR) are required to engage in extensive research through the se-mester and submit a final written memo to demonstrate their mastery of legal research and ability to synthesize that research into a predictive memo. During the course, students learn to develop a research strategy; to understand the interrelationship of cases, statutes and regula-tions; and to evaluate the best sources to find an answer to the question at hand. With his back-ground in law from his prior studies and his practical experience, Ahmed developed, over the course of the semester, deep research skills which will serve him well as a law clerk. His written work product throughout the semester was thoughtful, well grounded, and well written.

Ahmed's experiences interning with the Massachusetts's Supreme Judicial Court during his spring semester at Harvard Law School, as well as his experience as a research associate for the Research Institute of International Law served Ahmed well during our ALR course. Ahmed had the practical experience to fully embrace research and writing as a systematic and iterative pro-cess. A strong researcher will leverage all of the tools available to him to conduct his research. Ahmed exemplified this principle during the semester. He was thoughtful in developing an ap-proach to each research problem while remaining flexible to adapt his research as he made new discoveries.

Throughout the semester Ahmed sought opportunities to stretch his skills, using all of the avail-able research platforms at his disposal. Although this is highly encouraged during the semester, most students default to the familiar. Ahmed clearly understood that an exceptional research cannot rely solely on one platform or source of information and he worked hard to build capacity in all fee-based research platforms, as well as government websites and print based material. His contributions in class were informed by his simultaneous experience as a law clerk. During the course, he was able to provide his classmates with a unique perspective, both from his educa-tional experience and his real-world experience. Ahmed is a learner by nature, evident by his high level of curiosity and eagerness to hone his research skills. He came to class prepared not only to learn but to engage deeply with the class. I could count on him to be an active participant, asking questions that furthered learning not only for himself but for the entire class.

Ahmed was clear during the semester that he wanted to pursue clerkship opportunities as a way to further support his familiarity and understanding of U.S. law and the legal system. As a teach-er, lecturer and researcher, his work has focused on the public good. He expressed that a clerk-ship would enable him to continue to contribute more broadly for the public benefit.

Ahmed is personable, engaging and insightful. We had the opportunity to talk at length about the value of clerking, particularly at the state level, to develop a deep understanding of the local bar and the workings of the state courts and legal systems. Ahmed seeks a clerkship to utilize his re-search and writing skills, which are exemplary. Ahmed has the necessary technical and personal skills to be a valuable contributor. It is without hesitation that I recommend him for a position in your chamber.

Sincerely,

Jocelyn Kennedy, Lecturer on Law
Executive Director, Harvard Law School Library

Jocelyn Kennedy - jokennedy@law.harvard.edu - 617-496-2108

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am pleased to write this combined academic and professional recommendation for Ahmed Farooq, who received his LLM degree from Harvard Law School on May 30, 2019. We first met during the Winter Term 2018-19 and then in the Spring Semester 2019, he participated in an Independent Clinical Placement under my supervision with Justices Barbara Lenk and Frank Graziano of the Massachusetts Supreme Judicial Court. As part of that internship he wrote an excellent paper for me on a little known and little understood, but increasingly utilized, preemptive step in civil procedure called pre-service removal. His paper titled, “Addressing the Validity of Pre-Service Removal” provided a full review of how the several federal circuits have addressed this practice. His conclusion, favoring legislation over waiting for the US Supreme Court to resolve the competing issues arising from the circuit courts, was persuasive.

What was impressive about Ahmed’s work for the two justices were the comments of his direct supervisor. She wrote me the following at the end of the semester; “Ahmed was extremely dedicated and hardworking during his internship and worked extra hours at his own request to finish projects.” She continued, “Ahmed also is an extremely nice person and was well liked by all;” I can easily confirm his dedication to his internship assignments when I look back at his weekly reflections required by the Independent Clinical at Harvard Law School. Each week he sent me a timely review of the legal research assigned to him as well as his general evaluation of the challenges presented (without, of course, breaching any requirements of confidentiality). No student doing an Independent Clinical judicial placement with me has been so thorough in reporting their accomplishments week by week.

As a result of both my direct work with Ahmed and the positive evaluation of his immediate supervisor at the Massachusetts Supreme Judicial Court, I am comfortable recommending him for further academic study, an appellate clerkship, or the practice of law.

Sincerely,

Honorable John Cratsley (Retired, MA Superior Court)
Director of the Judicial Process in Trial Courts Clinic and Class
Lecturer on Law, Harvard Law School
Adjunct Faculty, Boston College Law School

John Cratsley - jcratsley@law.harvard.edu

AHMED FAROOQ

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WRITING SAMPLE

Drafted Summer 2020

The following writing sample is a memorandum analyzing the validity of pre-service removal—a litigation tactic through which a case may be moved from state court to federal court by a named, yet to be served, forum defendant—in the state of Pennsylvania. The writing sample has received no outside editing. The facts of the writing sample are largely hypothetical and were developed through after-class discussions with Professor Joseph Glannon, a visiting faculty member at Harvard Law School and a Professor of Law at Suffolk University.

JUDICIAL MEMORANDUM

To: Judges of the Ames District Court
From: Ahmed Farooq
Date: June 30, 2020
Re: Pre-Service Removal in Pennsylvania

Facts

A Virginia plaintiff filed a lawsuit against defendants from Massachusetts and Pennsylvania, respectively. The damages sought were $500,000. The plaintiff chose a state court in Pennsylvania as the forum for the case. Unbeknownst to the plaintiff, the defendant from Pennsylvania was monitoring his state's court docket and learnt of the impending lawsuit before he was officially served. Now, the Pennsylvania defendant, wishing to contest the case under federal procedural rules, has taken the necessary steps to have the case removed from state court to a federal district court.

Questions Presented

I. Does there exist a legal framework under which an in-state defendant may rightfully remove a case from a state court to a federal court prior to being served?

II. Under federal law, can a defendant from Pennsylvania, prior to being officially served with a lawsuit, successfully remove a case from state court to federal district court when the amount in controversy in the case exceeds $75,000 and the plaintiff and defendant are citizens of different states?

Brief Answers

I. Yes. The method through which this may be undertaken though is qualified. When diversity jurisdiction exists, out-of-state defendants are entitled to remove cases from state to federal court in order to avoid prejudice from the local community. In-state defendants are precluded from doing so because they do not stand to face any prejudice from their own home

community. This is referred to as the forum-defendant rule and it only applies when the in-state defendant has been properly joined and served. When proper joinder has not occurred, the rule does not apply, and an in-state defendant may remove a case from his local state court to federal court—a process known as pre-service removal.

II. Almost certainly, yes. Under the present facts, diversity of jurisdiction exists, the case has been lodged in a state court in Pennsylvania and the in-state defendant has chosen to file for removal prior to officially being served. The forum-defendant rule would ordinarily have barred the Pennsylvania defendant from removing the case to federal court, but it will not apply here because the Pennsylvania defendant was not properly joined and served. Therefore, theoretically, the Pennsylvania defendant can file for pre-service removal. The salient question then is whether a Pennsylvania court would recognize the validity of a removal of such a nature. Federal courts across the United States have for over a decade struggled with accepting the legitimacy of pre-service removal procedures. However, the Court of Appeals for the Third Circuit, in 2018, recognized the validity of pre-service removals by interpreting the forum-defendant rule under its plain meaning. A Pennsylvania district court would consequently be bound by the precedent and reasoning of the Third Circuit's decision and would ultimately uphold the Pennsylvania defendant's pre-service removal motion.

Discussion

The procedural maneuver through which a named forum defendant may remove a civil case from his local state court to a federal court prior to formally being served is known as pre-service removal. The validity of pre-service removals constitutes an area of law that is the subject of fierce debate among scholars and contradictory judicial decisions across federal courts. Arguments on the permissibility of this litigation tactic commonly center on textualist interpretations of 28 U.S.C. § 1441(b)(2), analyses of congressional intent, and general policy contentions—to make a probabilistic prediction of whether a federal court in the state of

Pennsylvania would permit pre-service removal, it is necessary to exposit each of the foregoing considerations. Therefore, the discussion that follows will (1) detail the legal framework of pre-service and (2) with reference to policy arguments and case law, ultimately assess how a federal court in the state of Pennsylvania would rule on the matter.

I. The Legal Framework of Pre-Service Removals

The doctrine of pre-service removals is situated within the overarching law of removals. Removals are governed by 28 U.S.C. § 1441: generally, … "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court." See 28 U.S.C. § 1441 (2018). This denotes that if an action could have originally been filed in federal court, it can also be removed from a state court to a federal court. See Matthew Curry, Plaintiff's Motion to Remand Denied: Arguing for Pre-Service Removal under the Plain Language of the Forum-Defendant Rule, 58 Clev. St. L. Rev. 907, 909 (2010).

One of the ways in which a case can be removed from state court to federal court under 28 U.S.C. § 1441 is on the basis of diversity jurisdiction. See 16 Moore's Federal Practice - Civil § 107.50 (2019). A finding of diversity jurisdiction may be made under the existence of two cumulative circumstances: first, the amount in controversy must exceed the value or sum of $75,000, and second, the lawsuit in question must be between citizens of different states. See 28 U.S.C. § 1332(a)(1) (2018). Therefore, when diversity jurisdiction exists and a plaintiff opts to file a case in state court instead of federal court, it is the defendant's prerogative to remove that case to a federal district court if he wishes to do so.

Removal on the basis of diversity jurisdiction, however, does not exist without qualification. 28 U.S.C. § 1441(b)(2) promulgates a prohibition to permitting removal in cases of diversity jurisdiction: "A civil action otherwise removable solely on the basis of . . .

[diversity jurisdiction] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." See 28 U.S.C. § 1441(b)(2) (2018). Therefore, properly joined and served defendants are prohibited from removing a case from state to federal court on the basis of diversity jurisdiction if they are, themselves, citizens of the forum state. See id. This is known as the forum-defendant rule, and it applies not only to removal actions initiated by the forum defendant, but to removal actions by any defendant.

The purpose of the forum-defendant rule is concomitant with that of diversity jurisdiction and is instrumental in understanding pre-service removal. Diversity jurisdiction exists to provide out of state litigants with an unbiased forum, and thereby protects them against local prejudices. See 16 Moore's Federal Practice - Civil § 107.55 (2018). Against the presumption that an in-state defendant would not suffer from any such prejudice, the forum-defendant rule logically precludes removal when the defendant is from the forum state itself. This proposition stands in relation to out-of-state defendants as well, provided that the in-state defendant has been properly joined and served. In such circumstances, out-of-state defendants are thought to be privy to a home-court advantage by proximity to the in-state defendant; this, coupled with the fact that the plaintiff is not from the forum state as well is thought to be sufficient to remove any risk of the out-of-state defendant facing local biases.

The text of 28 U.S.C. § 1441(b)(2) itself gives rise to the concept of pre-service removal. Specifically, it is the phrase – *properly joined and served* – that constitutes the basis for arguments seeking to legitimize pre-service removal practices. Essentially, assume a forum defendant were to somehow preempt formal notice of a lawsuit—either by electronically monitoring state court dockets or by recognizing that a plaintiff was serving non-forum defendants and that it was only a matter of time before he would be served—and apply to have a prospective case removed from state to federal court before he could be *properly joined and*

served. In such circumstances, the forum defendant rule will not apply because the forum defendant was never properly joined and served, and therefore, on a plain reading of 28 U.S.C. § 1441(b)(2), removal from state to federal court would be permitted. This would amount to pre-service removal.

Thus, there certainly exists a legal framework for the exercise of pre-service removals: when diversity jurisdiction exists and a plaintiff chooses to file a case in the defendant's state court, and the defendant moves to have the case removed to federal court before he has been properly joined and served, pre-service removal may be permitted.

II. The Ruling of a Federal District Court in Pennsylvania

The stipulated facts are a paradigmatic illustration of the practice of pre-service removal. The plaintiff and the defendant belong to different states, and therefore, diversity jurisdiction exists. Ordinarily, the Pennsylvania defendant would be able to remove the case from state court to federal district court, but on the present facts, the plaintiff filed his case in the defendant's home state. The forum-defendant rule would preclude removal in such circumstances. However, it seems that the Pennsylvania defendant was never properly joined and served, so the forum-defendant rule is inapplicable—the Pennsylvania defendant can move for pre-service removal. And as established in the foregoing section, on a particular interpretation of the forum defendant rule, the law does seem to permit the practice of pre-service removal. However, not all courts subscribe to such interpretations and the question of the Pennsylvania defendant succeeding in his action rests on whether federal courts in his home state consider pre-service removal a legitimate litigation maneuver. This section will therefore evaluate the arguments that have both buttressed and negated pre-service removals and then analyze which of these arguments have been found to be convincing by courts in the state of

Pennsylvania. Against this backdrop, a prediction of how a district court in Pennsylvania would rule on the stipulated facts will be made.

One of the most commanding arguments in support of pre-service removal lies under the plain language rule—a general principle of statutory interpretation. The plain language rule posits that when an authoritative written text of the law has been adopted, the particular language of that text is always the starting point on any question concerning the application of the law. See 2A Norman Singer, Sutherland Statutory Construction § 45:1 (7th ed. 2009). The text of the forum-defendant rule, under its plain meaning, permits removal in diverse cases when an in-state defendant has not properly been joined and served. Consequently, pre-service removal seems to be permissible within the strictures of the forum-defendant rule.

In contrast, critics of pre-service removal commonly equilibrate on the contention that permitting this litigation tactic would be to misconstrue congressional intent. The purpose of the *joined and served* language of the forum-defendant rule is understood to be to prevent gamesmanship by plaintiffs who might otherwise name an in-state defendant against whom there is no valid claim merely to prevent removal by the other defendants. See 16 Moore's Federal Practice - Civil § 107.50 (2019). However, if defendants were allowed to swiftly remove newly filed state court cases before the plaintiff has had a chance to serve the forum defendant, congressional intent to prevent litigant gamesmanship would be turned on its head. See DeAngelo-Shuayto v. Organon USA, Inc., WL 4365311 8-15 (D.N.J. 2007). To interpret the forum-defendant rule under its plain meaning would be to produce a result clearly at odds with congressional intent.

A district court in Pennsylvania would, in all likelihood, uphold a motion for pre-service removal, largely on the basis of precedent—in 2018, the United States Court of Appeals for the Third Circuit, in the face of a decade of contradictory district court decisions, recognized

the validity of pre-service removal with finality by allowing a forum defendant to move a case from state court to federal court prior to being served. See Encompass Insurance Co. v. Stone Mansion Restaurant, Inc., 902 F.3d 147 (3d Cir. 2018). In Encompass, the counsel for the forum defendant initially agreed, as evidenced from email correspondence, to accept electronic service of process rather than formal service. See id. at 150. However, defence counsel, prior to acceptance of electronic service, removed the case from state court to federal court. See id. Encompass subsequently filed a motion to remand the matter to the state trial court on the grounds that removal was improper pursuant to the forum defendant rule. See id. The district court denied the motion. See id. The district court concluded that the forum defendant rule did not apply because it precluded removal only if any of the parties in interest properly joined and served as defendants were a citizen of the state in which the action was brought—Stone Mansion was such a citizen but had not been properly joined and served since their defence counsel had not accepted service of Encompass' complaint until after the filing of a notice of removal. See id.

The Court of Appeals for the Third Circuit upheld the decision of the district court on two core strands of reasoning. First, the Court alluded to the plain language of the forum-defendant rule and concluded that § 1441(b)(2) unambiguously precludes removal on the basis of in-state citizenship only when the forum defendant has been properly joined and served. See Encompass, 902 F.3d at 151. Second, the Court determined that the congressional intent undergirding the forum-defendant rule was to prevent a plaintiff from blocking removal actions by joining as a defendant a resident party against whom they have no intention of proceeding and whom they may not even serve. See id. Given that there was no question of fraudulent joinder in Encompass, the Court held that permitting pre-service removal did not contravene congressional intent. Thus, the Court accepted the validity of pre-service removal.